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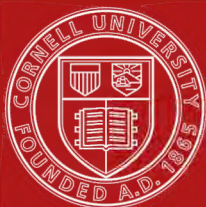
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A TREATISE

ON

THE LAW

RELATING TO

PUBLIC OFFICERS

AND

SURETIES IN OFFICIAL BONDS

BY

MONTGOMERY H. THROOP

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PREFACE

In this country, the appointment or election of public officers, their tenure of office, powers, duties, and liabilities, and their official oaths and bonds, are minutely regulated by statute. This book does not consider such statutory provisions, nor is it intended for use in any particular locality. And it does not undertake to treat of particular officers, the powers, duties, etc., of many of whom, such as sheriffs, justices of the peace, etc., form the subject of numerous and voluminous special treatises. It aims to collect, arrange in a logical and convenient form, apply, and comment upon, the general rules of law, relating to all public officers, from the highest to the lowest, and sureties in their official bonds, as found in the adjudications of the courts in England and in this country. Those adjudications, although exceedingly numerous, as the list of cases, prefixed to the text, will show, are scattered under various heads in the digests and text books, and for want of such an arrangement and elucidation as I have attempted to make, are found with difficulty, and, when found, are often contradictory. I have bestowed much time and great labor in collecting the cases, and in examining them and discussing them; and I hope and believe that no relevant case, which had been published when these pages went to press, has escaped my vigilance. I commend the result of my labors to a generous profession, in confidence that the work which I have attempted was greatly needed, and in the hope that I have been able to accomplish it so as to supply the need

MONTGOMERY H. THROOP.

302 STATE STREET, ALBANY, N. Y., January, 1892.

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ABBREVIATIONS.

A. & E.	Adolphus & Ellis's Reports, Q. B.
A. K. Marsh.	A. K. Marshall's Reports, Kentucky.
A. & E., N. S.	Adolphus & Ellis's Reports, New Series, (Queen's Bench Reports).
Abb. App. Dec.	Abbott's Decisions of the Court of Appeals of New York.
Abb. N. C.	Abbott's New Cases, Practice Reports, New York (all the Courts).
Abb. Pr.	Abbott's Practice Reports, New York (all the Courts).
Abb. Pr., N. S.	Abbott's Practice Reports, New Series, N. Y. (all the Courts).
Abb. U. S.	Abbott's Reports, United States Circuit and District Courts.
Ad. & El.	Adolphus & Ellis's Reports, K. B.
Ad. & El., N. S.	Queen's Bench Reports, or Adolphus and Ellis's New Series.
Aik.	Aiken's Reports, Vermont.
Ala.	Alabama; Alabama Reports.
Ala. Sel. Cas.	Alabama Select Cases, Shephard.
Alb. L. J.	Albany Law Journal, N. Y.
Allen.	Allen's Massachusetts Reports.
Am. or Amer.	American Reports.
Amer. Dec.	American Decisions.
Ambl.	Ambler's Reports, Chancery, England.
And.	Anderson's Reports, K. B.
Andrews.	Andrews's Reports, K. B.
Anon.	Anonymous.
Anstr.	Anstruther's Reports, K. B.
Ariz.	Arizona; Arizona Reports.
Ark.	Arkansas; Arkansas Reports.
Ashm.	Ashmead's Nisi Prius Reports, Pennsylvania.
Assize, Book of.	Year Book.
Atk.	Atkyns's Chancery Reports, England.
B. N. P.	Buller's Nisi Prius.
B. R.	King's Bench.
B. & Ad.	Barnewall & Adolphus's Reports, K. B.
B. & Ald.	Barnewall & Alderson's Reports, K. B.
B. & B.	Broderip & Bingham's Reports, C. P.
B. & C.	Barnewall & Cresswell's Reports, K. B.
B. & P.	Bosanquet & Puller's Reports, C. P.
B. & P. N. R.	Bosanquet & Puller's New Reports, C. P.
B. & S.	Best & Smith's Reports, Q. B.
B. Mon.	B. Monroe's Reports, Kentucky.
Bac. Abr.	Bacon's Abridgment.
Bailey	Bailey's Law Reports, South Carolina.

ABBREVIATIONS

Bailey Eq.	Bailey's Equity Reports, South Carolina.
Baldw.	Baldwin's United States Circuit Court Reports.
Barb.	Barbour's Reports, Supreme Court, New York.
Barb. Ch.	Barbour's Chancery Reports, New York.
Barn.	Barnardiston's Reports, K. B.
Barn. Ch.	Barnardiston's Reports, Chancery, England.
Barn. & Ad.	Barnewall & Adolphus's Reports, K. B.
Barn. & Ald.	Barnewall & Alderson's Reports, K. B.
Barn. & Cr.	Barnewall & Cresswell's Reports, K. B.
Barr.	Barr's Reports, Pennsylvania.
Baxt.	Baxter's Reports, Tennessee.
Bay.	Bay's Reports, South Carolina.
Beav.	Beavan's Reports, Rolls Court.
Bee.	Bee's U. S. District Court Reports.
Ben.	Benedict's Reports, U. S. District Court.
Bibb.	Bibb's Reports, Kentucky.
Bing.	Bingham's Reports, C. P.
Bing. N. C.	Bingham's New Cases, C. P.
Binn.	Binney's Reports, Pennsylvania.
Biss.	Bissell's Reports, U. S. Circuit Court.
Bl. Com.	Blackstone's Commentaries.
Elack.	Black's Reports, U. S. Supreme Court.
Blackf.	Blackford's Reports, Indiana.
Blackst. Commen.	Blackstone's Commentaries.
Blackst. H.	Henry Blackstone's Reports, C. P.
Blackst. W.	Sir William Blackstone's Reports, K. B.
Bland.	Bland's Chancery Reports, Maryland.
Blatchf.	Blatchford's Reports, U. S. Circuit Court.
Bligh.	Bligh's Reports, House of Lords.
Bligh N. S.	Bligh's Reports, New Series, House of Lords.
Bond.	Bond's Reports, U. S. District Court.
Book of Assize.	The Year Book.
Bos. & Pull.	Bosanquet & Puller's Reports, C. P.
Bos. & Pull., N. R.	Bosanquet & Puller's New Reports, C. P.
Bos. or Bosw.	Bosworth's Reports, Superior Court of New York city.
Bradf.	Bradford's Reports, Iowa.
Bradf. Surr.	Bradford's Reports, Surrogate's Court, New York.
Branch.	Branch's Reports, Florida.
Brev.	Brevard's Reports, South Carolina.
Brewst.	Brewster's Reports, Nisi Prius, Pennsylvania.
Brightley.	Brightley's Reports, Nisi Prius, Pennsylvania.
Bro. Ch.	Brown's Reports, Chancery, England.
Bro. P. C.	Brown's Parliamentary Cases.
Brock.	Brockenborough's Reports, U. S. Circuit Court.
Brod. & Bing.	Broderip & Bingham's Reports, C. P.
Bull. N. P.	Buller's Nisi Prius.
Bulstr.	Bulstrode's Reports, K. B.
Burr.	Burrow's Reports, K. B.
Bush.	Bush's Reports, Kentucky.
C. B.	Common Bench or Common Pleas.

ABBREVIATIONS

C. B.	Common Bench Reports, by Manning, Granger & Scott.
C. B., N. S.	Common Bench Reports, New Series, by Scott.
C. P.	Common Pleas.
C. & J.	Crompton & Jervis's Reports, Exchequer.
C. & K.	Carrington & Kirwan's Reports, Nisi Prius, England.
C. & M.	Crompton & Meeson's Reports, Exchequer.
C. & P.	Carrington & Payne's Reports, Nisi Prius, England.
C. L. R.	Common Law Reports, England.
Caines.	Caines's Reports, New York.
Caines Cas.	Caines's Cases, New York.
Cal.	California; California Reports.
Cald.	Caldecott's Reports, K. B.
Call.	Call's Reports, Virginia.
Calth.	Calthorpe's Reports, K. B.
Campb.	Campbell's Reports, Nisi Prius, England.
Car. & Kir.	Carrington & Kirwan's Reports, Nisi Prius, England.
Car. & Mar.	Carrington & Marshman's Reports, Nisi Prius, England.
Car. & P.	Carrington & Payne's Reports, Nisi Prius, England.
Carth.	Carthew's Reports, K. B.
Cas. temp. Finch.	Cases in the time of Finch, Chancery, England.
Cas. temp. Hardwicke.	Cases in the time of Hardwicke, K. B.
Cas. temp. Holt.	Cases in the time of Holt, K. B.
Cas. temp. Talbot.	Cases in the time of Talbot, Chancery, England.
Ch.	Chancery.
Ch'r.	Chancellor.
Ch. B.	Chief Baron.
Ch. J.	Chief Judge or Chief Justice.
Charlt.	T. U. P. Charlton's Reports, Georgia.
Charlt. R. M.	R. M. Charlton's Reports, Georgia.
Chitt.	Chitty's Reports, Bail Court, England.
Chitt. Contr.	Chitty on Contracts.
Civ. Proc. Rep.	Civil Procedure Reports, New York.
Cl. & Finn.	Clarke & Finnely's Reports, House of Lords.
Cliff.	Clifford's Reports, U. S. Circuit Court.
Co.	County.
Co. Ct.	County Court.
Coke.	Coke's Reports, K. B.
Coldw.	Coldwell's Reports, Tennessee.
Colo.	Colorado; Colorado Reports.
Com. Dig.	Comyn's Digest.
Comb.	Comberbach's Reports, K. B.
Comm.	Commonwealth.
Commen. or Com.	Commentaries.
Com'r.	Commissioner.
Comp'y.	Company.
Comyn.	Comyn's Reports, K. B. and C. P.
Conn.	Connecticut; Connecticut Reports.
Cooke.	Cooke's Reports, Tennessee.

ABBREVIATIONS

Cooley Const. Lim.	Cooley on Constitutional Limitations,
Cooley Mun. Corp.	Cooley on Municipal Corporations.
Cooper.	Cooper's Reports, Chancery, England.
Cooper Ch.	Cooper's Reports, Chancery, Tennessee.
Cow.	Cowen's Reports, N. Y.
Cowp.	Cowper's Reports, K. B.
Cox.	Cox's Reports, Chancery, England.
Coxe.	Coxe's Reports, New Jersey.
Cr. or Cranch.	Cranch's Reports, United States Supreme Court.
Cranch C. C.	Cranch's Reports, U. S. Circuit Court.
Cro. Eliz.	Croke's Reports, Queen Elizabeth.
Cro. Jac.	Croke's Reports, King James I.
Cro. Car.	Croke's Reports, King Charles I.
Crompt. & J.	Crompton & Jervis's Reports, Exchequer.
Crompt. & M.	Crompton & Meeson Reports, Exchequer.
Crompt. M. & R.	Crompton, Meeson & Roscoe's Reports, Exchequer.
Ct. Cl.	Reports of the United States Court of Claims.
Curn.	Cunningham's Reports, K. B.
Curtis.	Curtis's Reports, U. S. Circuit Cour
Cush.	Cushing's Reports, Massachusetts.
D. or Div.	Division (in the reports of the English High Court of Justice), <i>ex. gr.</i> , Q. B. D., Queen's Bench Division, etc.
D. C.	District of Columbia.
D. & E.	Durnford & East's Reports (Term Reports), K. B.
D. & L.	Dowling and Lowndes's Reports, Bail Court.
D. & R.	Dowling & Ryland's Reports, K. B.
Dak.	Dakota Territory ; Dakota Reports.
Dav. & M.	Davison & Merivale's Reports, Q. B.
Daly.	Daly's Reports, Common Pleas, New York city & county.
Dana.	Dana's Reports, Kentucky.
Davies.	Davies's Reports, U. S. District Court.
Day	Day's Reports, Connecticut,
De Gex & J.	De Gex & Jones's Reports, Chancery, England.
De Gex, F. & J.	De Gex, Fisher & Jones's Reports, Chancery, England.
De Gex, J. & S.	De Gex, Jones & Smith's Reports, Chancery, England.
De Gex, M. & G.	De Gex, Macnaghton & Gordon's Reports, Chancery, England.
De Gex & Sm.	De Gex & Smale's Reports, Chancery, England.
Del	Delaware ; Delaware Reports,
Del. Ch.	Delaware Chancery Reports.
Denio.	Denio's Reports, New York.
Denn. Cr. Cas.	Dennison's Crown Cases.
Desau.	Desausure's Equity Reports, South Carolina.
Dev. Eq.	Devereux's Equity Reports, North Carolina.
Dev. L.	Devereux's Law Reports, North Carolina.
Dev. & B. Eq.	Devereux & Battle's Equity Reports, North Carolina.
Dev. & B. L.	Devereux & Battle's Law Reports, North Carolina.
Dillon.	Dillon's Reports, U. S. Circuit Court.
Dillon Mun. Corp.	Dillon on Municipal Corporations.

ABBREVIATIONS

Dougl.	Douglas's Reports, K. B.
Dougl. (Mich.)	Douglass's Reports, Michigan.
Dow. & Ry.	Dowling & Ryland's Reports, Nisi Prius, England.
Dowl. P. C.	Dowling's Practice Cases.
Duer.	Duer's Reports, Superior Court, city of New York.
Duv.	Duvall's Reports, Kentucky.
Dy. or Dyer.	Dyer's Reports, K. B.
East.	East's Reports, K. B.
East P. C.	East's Pleas of the Crown.
Eden.	Eden's Reports, Chancery, England.
Edm. Sel. Cas.	Edmonds's Select Cases, New York.
Edw. Ch.	Edwards's Chancery Reports, New York.
El. & B.	Ellis & Blackburn's Reports, Q. B.
El. B. & E.	Ellis, Blackburn & Ellis's Reports, Q. B.
El. B. & S.	Ellis, Best & Smith's Reports, Q. B.
El. & El.	Ellis & Ellis's Reports, Q. B.
Exch.	Exchequer; Welsby, Hurlstone & Gordon's Reports, Exchequer.
Fed. R.	Federal Reporter, U. S. Courts.
Fla.	Florida; Florida Reports.
Freem.	Freeman's Reports, K. B.
Ga.	Georgia; Georgia Reports.
Ga. Dec.	Georgia Decisions.
Gall.	Gallison's Reports, Circuit Court, U. S.
Gill.	Gill's Reports, Maryland.
Gill & J.	Gill & Johnson's Reports, Maryland.
Gilm. (Ill.)	Gilman's Reports, Illinois.
Gilm. (Va.)	Gilmer's Reports, Virginia
Gilp.	Gilpin's Reports, U. S. District Court.
Grant Cas.	Grant's Cases, Pennsylvania.
Gratt.	Grattan's Reports, Court of Appeals, Virginia.
Gray.	Gray's Reports, Massachusetts.
Greene.	Greene's Reports, Iowa.
H. L. or H. L. Cas.	Clark & Finnely's House of Lords Reports, New Series.
H. & C.	Hurlstone & Coltman's Reports, Exchequer.
H. & M.	Hening & Munford's Reports, Virginia.
H. & N.	Hurlstone & Norman's Reports, Exchequer.
H. & R.	Harrison & Rutherford's Reports, C. R.
H. & W.	Harrison & Wollaston's Reports, K. B.
H. Blackst	Henry Blackstone's Reports, C. P.
Hall.	Hall's Reports, Superior Court, New York city.
Handy.	Handy's Reports, Superior Court, city of Cincinnati.
Hard. or Hardin.	Hardin's Reports, Kentucky.
Hardres.	Hardres's Reports, Exchequer.
Hare.	Hare's Reports, Chancery, England.
Harr. (Del.)	Harrington's Reports, Delaware.
Harr. (Mich.)	Harrington's Reports, Chancery, Michigan.
Harr. & Gill.	Harris & Gill's Reports, Maryland.
Harr. & J.	Harris & Johnson's Reports, Maryland.

ABBREVIATIONS

Harr. & McH.	Harris & McHenry's Reports, Maryland.
Hawk. P. C.	Hawkins's Pleas of the Crown.
Hawks.	Hawks's Reports, North Carolina.
Head.	Head's Reports, Tennessee.
Heisk.	Heiskell's Reports, Tennessee.
Hen. & Mun.	Hening & Munford's Reports, Virginia.
High Extr. Rem.	High's Extraordinary Remedies.
High Inj.	High on Injunctions.
Hill (N. Y.)	Hill's Reports, New York.
Hill (S. C.)	Hill's Law Reports, South Carolina.
Hill Eq.	Hill's Equity Reports, South Carolina.
Hill & Denio.	Lalor's Supplement to Hill's and Denio's Reports, New York.
Hilt.	Hilton's Reports, Common Pleas, city and county of New York.
Hobart.	Hobart's Reports, K. B.
Holmes.	Holmes's Reports, U. S. Circuit Court.
Holt.	Holt's Reports, K. B.
Holt N. P.	Holt's Nisi Prius Reports, England.
Hopw. & C.	Hopwood & Coltman's Registration Appeal Cases, England.
Hopk.	Hopkins's Reports, Chancery, New York.
Houst.	Houston's Reports, Delaware.
How.	Howard's Reports, U. S. Supreme Court.
How. App. Cas.	Howard's Court of Appeals Cases, New York.
How. Pr.	Howard's Practice Reports, New York, all the Courts.
How. Pr., N. S.	Howard's Practice Reports, New Series, New York.
How. St. Tr.	Howell's State Trials, England.
Hughes, (Ky.)	Hughes's Reports, Kentucky.
Hughes, (U. S.)	Hughes's Reports, U. S. Circuit Court.
Humph.	Humphrey's Reports, Tennessee.
Hun.	Hun's Reports, Supreme Court, New York.
Idaho.	Idaho; Idaho Reports.
Ill.	Illinois; Illinois Reports.
Ill. App.	Illinois Appellate Court Reports.
Ind.	Indiana; Indiana Reports.
Ind. App.	Indiana Appellate Court Reports.
Inst.	Coke's Institutes,
Iowa.	Iowa; Iowa Reports.
Ir. R., C. L.	Irish Reports, Common Law, Ireland.
Ir. R., Eq.	Irish Reports, Equity, Ireland.
Ired. Eq.	Iredell's Equity Reports, North Carolina.
Ired. L.	Iredell's Law Reports, North Carolina.
J. J. Marsh.	J. J. Marshall's Reports, Kentucky.
J. P.	The Justice of the Peace, English law periodical.
Jac. & W.	Jacob & Walker's Reports, Chancery, England.
Johns. or Johns. Ch.	Johnson's Reports, Chancery, England.
Johns. Ch. (N. Y.)	Johnson's Chancery Reports, New York.
Johns. (N. Y.)	Johnson's Reports, Law, New York.
Johns. Cas.	Johnson's Cases, New York.

ABBREVIATIONS

Jones Eq.	Jones's Equity Reports, North Carolina.
Jones L.	Jones's Reports, Law, North Carolina.
Jones, W.	Sir Wm. Jones's Reports, K. B.
Jur.	The Jurist, Reports in all the (English) Courts.
Jur. N. S.	The Jurist, New Series,
K. B.	King's Bench.
Kan.	Kansas ; Kansas Reports.
Kay.	Kay's Reports, Chancery, England.
Kay & J.	Kay & Johnson's Reports, Chancery, England.
Keb.	Keble's Reports, K. B.
Keling.	Sir John Keling's Reports, K. B.
Kent Commen.	Kent's Commentaries.
Keyes.	Keyes's Reports, N. Y. Court of Appeals.
Kirby.	Kirby's Reports, Connecticut.
Ky.	Kentucky ; Kentucky Reports.
L. J.	The Law Journal, Reports in all the (English) Courts.
L. R.	The Law Reports, Reports in all the (English) Courts.
L. T.	The Law Times, Reports in all the (English) Courts.
La.	Louisiana.
La. Ann.	Louisiana Annual Reports.
Lalor Supp.	Lalor's Supplement to Hill's & Denio's Rep , New York.
Lans.	Lansing's Reports, Supreme Court, New York
Latch.	Latch's Reports, K. B.
Ld. Ray.	Lord Raymond's Reports, K. B.
Lea.	Lea's Reports, Tennessee.
Leg. Obs.	The Legal Observer, New York.
Leigh.	Leigh's Reports, Virginia.
Leonard.	Leonard's Reports, K. B.
Lev.	Levinz's Reports, K. B.
Litt.	Littell's Reports, Kentucky.
Litt. Sel. Cas.	Littell's Select Cases, Kentucky.
Low. Dec.	Lowell's Decisions, U. S. District Court.
Lutw.	Lutwyche's Reports, C. P.
M. & S.	Maule & Selwyn's Reports, K. B.
M. & W.	Meeson & Welsby's Reports, Exchequer.
Mac. & G.	Macnaghton & Gordon's Reports, Chancery, England.
Mackey.	Mackey's Reports, District of Columbia.
MacArthur.	MacArthur's Reports, District of Columbia.
Man. & G.	Manning & Granger's Reports, C. P.
Man. & Ry.	Manning & Ryland's Reports, K. B.
Marsh.	Marshall's Reports, C. P.
Marsh. A. K.	A. K. Marshall's Reports, Kentucky.
Marsh. J. J.	J. J. Marshall's Reports, Kentucky.
Mart.	Martin's Reports, Louisiana.
Mart. N. S.	Martin's Reports, New Series, Louisiana.
Mason.	Mason's Reports, U. S. Circuit Court.
Mass.	Massachusetts ; Massachusetts Reports.
Maule & S.	Maule & Selwyn's Reports, K. B.
McAll.	McAllister's Reports, U. S. Circuit Court.

ABBREVIATIONS.

McCord.	McCord's Reports, Law, South Carolina.
McCord. Eq.	McCord's Equity Reports, South Carolina.
McL. or McLean.	McLean's Reports, U. S. Circuit Court.
McMull.	McMullan's Reports, Law, South Carolina.
McMull. Eq.	McMullan's Equity Reports, South Carolina.
Md.	Maryland ; Maryland Reports.
Md. Ch.	Maryland Chancery Decisions.
Me.	Maine ; Maine Reports.
Mees. & W.	Meeson & Welsby's Reports, Exchequer.
Met. (Mass.)	Metcalf's Reports, Massachusetts.
Met. (Ky.)	Metcalf's Reports, Kentucky.
Mich.	Michigan ; Michigan Reports.
Minn.	Minnesota ; Minnesota Reports.
Minor.	Minor's Reports, Alabama.
Miss.	Mississippi ; Mississippi Reports.
Mo.	Missouri ; Missouri Reports.
Mo. App.	Missouri Appellate Court Reports.
Mod.	Modern Reports, K. B.
Mon. B.	B. Monroe's Reports, Kentucky.
Mon. T. B.	T. B. Monroe's Reports, Kentucky.
Mont. ; Monta.	Montana ; Montana Reports.
Mood. & M.	Moody & Matkin's Reports, Nisi Prius, England.
Mood. & R.	Moody & Robinson's Reports, Nisi Prius, England.
Moore.	Sir G. Moore's Reports, published 1688; law French.
Moore, J. B.	J. B. Moore's Reports, C. P. and Exchequer Chamber.
Moore P. C.	Moore's Privy Council Cases.
Munf.	Munford's Reports, Virginia.
Murph.	Murphey's Reports, North Carolina.
Myl. & Cr.	Mylne & Craig's Reports, Chancery, England.
Myl. & K.	Mylne & Keene's Reports, Chancery, England.
N. C.	North Carolina ; North Carolina Reports.
N. C. Conf.	North Carolina Conference Reports (decisions upon a conference of the judges).
N. H.	New Hampshire ; New Hampshire Reports.
N. J.	New Jersey.
N. J. Eq.	New Jersey Equity Reports.
N. J. L.	New Jersey Law Reports.
N. R.	New Reports, by Bosanquet & Puller, C. P.
N. S.	New Series.
N. W. Rep'r.	Northwestern Reporter.
N. Y.	New York ; New York Reports, Court of Appeals.
N. Y. City Ct.	New York City Court Reports.
N. Y. Crim. R.	New York Criminal Reports.
N. Y. Leg. Obs.	New York Legal Observer.
N. Y. St. Rep'r.	New York State Reporter.
N. Y. Sup. Ct.	N. Y. Supreme Court Reports, by Thompson & Cook.
N. Y. Super. Ct.	Reports of the Superior Court of the city of New York.
N. Y. Supp.	New York Supplement.
N. & M.	Neville & Manning's Reports, K. B.

ABBREVIATIONS

N. & P.	Neville & Perry's Reports, K. B.
Neva.	Nevada ; Nevada Reports.
Nott & McC.	Nott & McCord's Reports, South Carolina.
Ohio.	Ohio ; Ohio Reports.
Ohio Cir. Ct.	Ohio Circuit Court Reports
Ohio St.	Ohio State Reports.
Oreg.	Oregon ; Oregon Reports.
Overt.	Overton's Reports, 1 & 2 Tennessee.
P. C.	Pleas of the Crown ; Parliamentary Cases.
P. J.	Presiding Judge or Justice.
p. r.	Parties reversed.
P. Wms.	Peere Williams's Reports, Chancery, England.
P. & D.	Perry & Davison's Reports, K. B.
Pa.	Pennsylvania.
Pa. Co. Ct.	Pennsylvania County Court Reports.
Pa. St.	Pennsylvania State Reports.
Paige.	Paige's Chancery Reports, New York.
Paine.	Paine's Reports, United States Circuit Court.
Park.	Parker's Reports, Exchequer.
Pars. Contr.	Parsons on Contracts.
Pars. Sel. Cas.	Parsons Select Cases, Equity, Pennsylvania.
Peake.	Peake's Reports, Nisi Prius, England.
Peck.	Peck's Reports, Tennessee.
Penna.	Pennsylvania Reports, by Penrose & Watts, 3 vols.
Per. & D.	Perry & Davison's Reports, K. B.
Pet.; Peters.	Peters's Reports, United States Supreme Court.
Peters C. C.	Peters's Circuit Court Reports, United States.
Phila.	Philadelphia Reports, Pennsylvania.
Pick.	Pickering's Reports, Massachusetts.
Plowd.	Plowden's Commentaries or Reports, K. B., translated from law French, 1792.
Port.	Porter's Reports, Alabama.
Prec. Ch.	Precedents in Chancery, by Finch, England.
Price.	Price's Reports, Exchequer.
Q. B.	Queen's Bench.
Q. B.	Queen's Bench Reports, or Adolphus and Ellis's Reports, New Series.
Q. B. D.	Queen's Bench Division (English Reports.)
R. I.	Rhode Island ; Rhode Island Reports.
R. S.	Revised Statutes.
Railw. Cas.	Railway Cases, England.
Rand.	Randolph's Reports, Virginia.
Rawle.	Rawle's Reports, Pennsylvania.
Raym. Ld.	Lord Raymond's Reports, K. B.
Raym. T.	Sir Thos Raymond's Reports, K. B.
Rep.; Rep'r.	Reporter.
R. M. Charl.	R. M. Charlton's Reports, Georgia.
Rice Eq.	Rice's Equity Reports, South Carolina.
Rice L.	Rice's Law Reports, South Carolina.
Rich. Eq.	Richardson's Equity Reports, South Carolina.

ABBREVIATIONS

Rich. Eq. Cas.	Richardson's Equity Cases, South Carolina.
Rich. L.	Richardson's Law Reports, South Carolina.
Rolle.	Rolle's Reports, K. B.
Root.	Root's Reports, Connecticut.
Russ.	Russell's Reports, Chancery, England.
Russ. & M.	Russell & Mylne's Reports, Chancery, England.
Russ. & R.	Russell & Ryan's Crown Cases.
Russ. Cr.	Russell on Crimes.
Ry. & M.	Ryan & Moody's Reports, Nisi Prius, England.
s.	Section.
S. & R.	Sergeant & Rawle's Reports, Pennsylvania.
S. C.	South Carolina; South Carolina Reports.
s, c.	Same Case.
S. E.	Southeastern Reporter.
S. P.	Same Principle.
S. W.	Southwestern Reporter.
Salk.	Salkeld's Reports, K. B.
Sandf.	Sandford's Reports, Superior Court, city of New York.
Sandf. Ch.	Sandford's Chancery Reports, New York.
Saund.	Saunders's Reports, K. B.
Sawyer.	Sawyer's Reports, Circuit Court of the United States.
Scott, N. R.	Scott's New Reports, C. P.
Selw. N. P.	Selwyn's Nisi Prius Reports, England.
Serg. & R.	Sergeant & Rawle's Reports, Pennsylvania.
Shearm. & Redf. Negl.	Shearman & Redfield on Negligence.
Show.	Shower's Reports, K. B.
Show. P. C.	Shower's Parliament Cases.
Sid.	Siderfin's Reports, K. B.
Sim.	Simons's Reports, Chancery, Engl.
Sim. N. S.	Simons's Reports, New Series, Chancery, England.
Sim. & St.	Simons & Stuart's Reports, Chancery, England.
Skinner.	Skinner's Reports, K. B.
Sm. & G.	Smale & Giffard's Reports, Chancery, England.
Sm. & M.	Smedes & Marshall's Reports, Mississippi.
Sm. & M. Ch.	Smedes & Marshall's Reports, Chancery, Mississippi.
Smith.	Smith's Reports, K. B.
Smith, E. D.	E. D. Smith's Reports, Common Pleas, city and county of New York.
Sneed.	Sneed's Reports, Tennessee.
Sneed Dec.	Sneed's Kentucky Decisions.
South. L. Review,	Southern Law Review.
South. Rep.	Southern Reporter.
Speers.	Speers's Reports, South Carolina.
Speers Eq.	Speers's Equity Reports, South Carolina.
St. Tr.	Howell's State Trials, England.
Stark.	Starkie's Reports, Nisi Prius, England.
Staunf. P. C.	Staundeforde's Pleas of the Crown.
Stephen Dig. Cr. L.	Stephen's Digest of the Criminal Law, England.
Stew.	Stewart's Reports, Alabama.
Stew. & P.	Stewart & Porter's Reports, Alabama.

ABBREVIATIONS

Story.	Story's Reports, Circuit Court of the United States.
Story Bail.	Story on Bailments.
Story Const.	Story on the Constitution.
Story Contr.	Story on Contracts.
Story Eq. Jur.	Story on Equity Jurisprudence.
Story Pro. N.	Story on Promissory Notes.
Str.; Stra.	Strange's Reports, K. B.
Strobb. Eq.	Strobbhart's Equity Reports, South Carolina.
Strobb. L.	Strobbhart's Law Reports, South Carolina.
Sumn.	Sumner's Reports, Circuit Court of the United States.
Sup. Ct.	Supreme Court.
Super. Ct.	Superior Court.
Supp.	Supplement.
Sup'r.	Supervisor.
Swan.	Swan's Reports, Tennessee.
Swanst.	Swanston's Reports, Chancery, England.
T. B. Mon.	T. B. Monroe's Reports, Kentucky.
T. R.	Term Reports, or Durnford & East's Reports, K. B.
T. R., N. S.	Term Reports, New Series, or East's Reports, K. B.
T. U. P. Charl't.	T. U. P. Charlton's Reports, Georgia.
T. & C.	Thompson & Cook's Reports, Supreme Court, New York.
T. Raym.	Sir Thos. Raymond's Reports, K. B.
Taunt.	Taunton's Reports, C. P.
Tenn.	Tennessee; Tennessee Reports.
Tenn. Ch.	Tennessee Chancery Reports.
Tex.	Texas; Texas Reports.
Tex. App.	Texas Court of Appeals Reports.
Tex. Supp.	Supplement to Vol. 25, Texas Reports.
Toml. L. Dict.	Tomlin's Law Dictionary.
Tyler.	Tyler's Reports, Vermont.
Tyrw.	Tyrwhitt's Reports, Exchequer.
Tyrw. & G.	Tyrwhitt & Granger's Reports, Exchequer.
U. S.	United States; United States Reports.
U. S. R. S.	United States Revised Statutes.
Utah.	Utah; Utah Territory Reports.
V. & B.	Vesey & Beames's Reports, Chancery, England.
Va.	Virginia; Virginia Reports.
Va. Cas.	Virginia Cases.
Vaughan.	Vaughan's Reports, K. B.
Vent.	Ventris's Reports, K. B.
Vern.	Vernon's Reports, Chancery, England.
Ves.	Vesey Senior's Reports, Chancery, England.
Ves. Jun.	Vesey Junior's Reports, Chancery, England.
Ves. & Bea.	Vesey & Beames's Reports, Chancery, England.
Vin. Abr.	Viner's Abridgement.
W. D.	Weekly Digest, New York, all the Courts.
W. R.	Weekly Reporter, England, all the Courts.
W. Va.	West Virginia; West Virginia Reports.
W. W. & D.	Willmore, Wollaston & Davison's Reports O. B.

ABBREVIATIONS

W. W. & H.	Willmore, Wollaston & Hodges's Reports, Q. B.
W. Blackst.	Sir William Blackstone's Reports, K. B.
W. Jones.	Sir Wm. Jones's Reports, K. B.
Walk.	Walker's Reports, Mississippi.
Walk. Ch.	Walker's Chancery Reports, Michigan.
Wall.	Wallace's Reports, United States Supreme Court.
Ware.	Ware's Reports, District Court of the United States.
Wash. (Va.)	Washington's Reports, Virginia.
Wash. (U. S.)	Washington's Reports, Circuit Court of the United States.
Watts.	Watts's Reports, Pennsylvania.
Watts & Serg.	Watts & Sergeant's Reports, Pennsylvania.
Week. Dig.	Weekly Digest, New York, all the Courts.
Wend.	Wendell's Reports, New York.
Whart.	Wharton's Reports, Pennsylvania.
Whart. Cr. L.	Wharton's American Criminal Law.
Wheat.	Wheaton's Reports, Supreme Court of the United States.
Willis.	Willis's Reports, C. P.
Wilm.	Wilmot's Notes of Opinions, K. B.
Wils.	Wilson's Reports, C. P.
Wils. Ch.	Wilson's Chancery Reports, England.
Wils. & Shaw.	Wilson & Shaw's Reports, House of Lords.
Winst.	Winston's Law and Equity Reports, North Carolina.
Wis.	Wisconsin ; Wisconsin Reports.
Wms. P.	Peere Williams's Chancery Reports, England.
Wms. Saund.	Saunders's Reports, K. B. with Williams's Notes.
Woods.	Woods's Reports, Circuit Court of the United States.
Woolw.	Woolworth's Reports, Circuit Court of the United States.
Wright.	Wright's Nisi Prius Reports, Ohio.
Wyo.	Wyoming ; Wyoming Reports.
Y. B.	Year Books (1307-1537), K. B., cited by the year of each king's reign, the page, and the number of the pl.
Y. & C.	Younge & Collier's Reports, Exchequer, Equity.
Y. & J.	Younge & Jervis's Reports, Exchequer.
Yates Sel. Cas.	Yates's Select Cases, New York.
Yeates.	Yeates's Reports, Pennsylvania.
Yelv.	Yelverton's Reports, K. B.
Yerg.	Yerger's Reports, Tennessee.
Younge.	Younge's Reports, Exchequer.
Younge & C.	Younge & Collier's Reports, Exchequer, Equity.
Younge & J.	Younge & Jervis's Reports, Exchequer.

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THE LAW
RELATING TO
PUBLIC OFFICERS
AND SURETIES IN OFFICIAL BONDS

BOOK I
PUBLIC OFFICERS GENERALLY

CHAPTER I
WHO IS A PUBLIC OFFICER

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§ 1. **How this question arises.**—The question, who is a public officer, and its correlative, what is a public office, become often important, and sometimes difficult of solution, chiefly in cases involving the construction of statutes or constitutional provisions, relating to public officers generally. With respect to the great majority of public functionaries, there is no difficulty in determining them to be officers under the national or a state government, as the case may be; but the precise line of demarkation between an officer and governmental agent, employee or contractor, is difficult to draw, so that with respect to many persons connected with the administration of public affairs, it is difficult to determine upon which side of it they are properly ranged.

§ 2. **English general definitions of “office” and “officer.”**—The following are the principal definitions of the words “office” and “officer,” which have been given in England: “It is said that the word *officium* principally implies a duty, and in the next place the charge of such duty, and that it is a rule that where one man hath

to do with another's affairs, against his will and without his leave, that this is an office, and he who is in it is an officer. Officers . . . are public or private; . . . and it is said that every man is a public officer who hath any duty concerning the public; and he is not the less a public officer, where his authority is confined to narrow limits, because it is the duty of his office, and the nature of that duty which makes him a public officer, and not the extent of his authority."¹

"In my opinion," said Lord Chief Justice Best, "every one who is appointed to discharge a public duty, and receives compensation, in whatever shape, from the crown or otherwise, is a public officer."² Blackstone includes offices among incorporeal hereditaments, and defines an office to be "a right to exercise a public or private employment, and to take the fees and emoluments thereunto belonging."³

§ 3. **American definitions of those words.**—The following definitions have been given in the United States: Chief Justice Marshall, holding that an agent of fortifications of the United States is a public officer, whose bond for the faithful discharge of his duties is an official bond, said: "An office is defined to be a public charge or employment, and he who performs the duties of the office is an officer. . . . Although an office is an 'employment' it does not follow that every employment is an office. A man may certainly be employed under a contract, express or implied, to do an act, or to perform a service, without

¹ Bac. Abr. tit. Offices and Officers, A. See also *Vaughn v English*, 8 Cala. 39; *Shelby v Alcorn*, 36 Miss. 273; *State v Vallé*, 41 Mo. 29, at p. 31; *People v Hayes*, 7 How. Pr. (N. Y.) 248.

² Best, Ch. J., in *Henly v Mayor of Lyme*, 5 Bing. 91.

³ Blackst. Commen. Book 2, ch. 3, p. 36. See also *Finch's Law*, 162; 3 Kent's Commen. 454; *Miller v Supervisors*, 25 Cala. 93, at p. 98; *People v Stratton*, 23 Cala. 382; *People v Nostrand*, 46 N. Y. 375, per Church, Ch. J., p. 381; *Olmstead v Mayor, etc.*, 42 N. Y. Super. Ct. 481.

becoming an officer. But if the duty be a continuing one, which is defined by the rules prescribed by the government, and not by contract, which an individual is appointed by government to perform, who enters upon the duties appertaining to his station, without any contract defining them, if those duties continue, though the person be changed, it seems very difficult to distinguish such a charge or employment from an office, or the person who performs the duties from an officer.”¹ “An office is a public station or employment, conferred by the appointment of government. The term embraces the ideas of tenure, duration, emolument, and duties . . . A government office is different from a government contract. The latter, from its nature, is necessarily limited in its duration, and specific in its objects. The terms agreed upon define the rights and obligations of both parties, and neither may depart from them without the assent of the other.”²

“A public office is an agency for the state, and the person whose duty it is to perform this agency is a public officer. . . . The oath, the salary or fees are mere incidents and constitute no part of the office. Where no salary or fees are annexed to the office, it is a naked office—honorary—and is supposed to be accepted merely for the public good. This definition also excludes the idea that a public office must have continuance. It can make no difference whether there be but one act or a series of

¹ *United States v Maurice*, 2 Brock. (U.S.) 96, per Marshall, Ch. J., pp. 102, 103; Followed in *Shelby v Alcorn*, 36 Miss. 273; *Bunn v People*, 45 Ill. 397. See also *In re Wood*, 2 Cow. (N. Y.) 29, note; *Hopk. Ch.* (N. Y.) 7; *Stone v United States*, 3 Ct. of Cl. (U.S.) 260.

² *United States v Hartwell*, 6 Wall. (U.S.) 385, per Swayne, J., p. 393. See also, *Bunn v People*, 45 Ill. 397, at p. 403; *Opinion of the Just.*, 3 Me. 481; *People v Nostrand*, 46 N. Y. 375, per Church, Ch. J., p. 381; *Brown v Turner*, 70 N. C. 93; *Sanford v Boyd*, 2 Cranch (U. S. Cir. Ct.) 78; *Hall v Wisconsin*, 103 U. S. 5.

acts to be done ; whether the office expires as soon as the one act is done, or is to be held for years, or during good behavior.”¹

§ 4. **The same subject.**—In a case involving the question whether an attorney is a public officer,² Platt, J., said : “Lexicographers generally define office to mean public employment; and I apprehend its legal meaning to be an employment on behalf of the government in any station or public trust, not merely transient, occasional or incidental. In common parlance, the term ‘office’ has a more general signification. Thus we say the office of executor or guardian, or the office of a friend.”³

This definition was approved in a case, involving the question, whether the constitutional provision of 1846, prohibiting the judges of the court of appeals and the justices of the supreme court of New York from exercising “any power of appointment to public office,” prevented the appointment by the supreme court of a person to act as surrogate in the matter of a particular estate, wherein the surrogate was interested, pursuant to a statute enacted before the constitutional provision was adopted. The court held that the appointment was valid. Allen, J., delivering the prevailing opinion, quoted Judge Platt’s definition with approval, and added: “The term ‘office’ has a very general signification, and is defined to be that function by virtue whereof a person has some employment in the affairs of another; and it may be public or private, or *quasi* public, as exercised under public authority, but yet affecting only the affairs of particular individuals. The presidency of a bank is spoken of as an office, and a trustee of a private trust is, in ordinary par-

¹ *Clark v Stanley*, 66 N. C. 59. As to the concluding sentence of this extract, see *In re Hathaway*, 71 N. Y. 238, cited *post*, § 4.

³ *In re the oaths, etc.*, 20 Johns. (N. Y.) 492, 493. Approved, *People v Nostrand*, 46 N. Y. 375, per Church, Ch. J., p. 381.

² See *post*, § 14.

lance, said to hold the office of trustee; and the term office is applied to an executor or guardian, etc. A referee, for the trial and decision of actions, is an officer exercising judicial powers under public authority. So receivers, appointed by the courts, and commissioners for the appraisal of damages for lands taken for public use, are officers, and strictly and technically exercise the functions of an office. But they are not ‘public officers,’ within the inhibition of the constitution. If they were, they could not have derived authority from the supreme court, or any justice thereof, while article 6, as adopted in 1846, was in force. . . . They owed no duty to the public, and could perform no service for the public. The trust they exercise, and the duties they perform, are ‘transient and occasional.’ They are not called upon to take the constitutional oath of office, and are not entitled to the emoluments of the office, except such as grow out of and pertain to the duties actually performed.”¹

§ 5. **The same subject. Attendant upon a court.**—It was settled in the State of New York, after some conflict of opinion, that an “attendant” upon a court of record in the city of New York is a “public officer,” within the provisions of a statute forbidding the increase of the salaries of public officers by the local authorities. In delivering the opinion which settled this controversy, Danforth, J., said: “He not only owes a duty to it,” (the court) “and is to perform such duties as are by it required to be performed, but, as we have already said, those duties are in aid of the proper business of the court . . . and his employment is one in which the public are interested; its proper exercise requires capacity, diligence, and attendance. Whether we look into the dictionary of our language, the terms of politics, or the diction of common life, we find that whoever has a public charge or employ-

¹ *In re Hathaway*, 71 N. Y. 238; aff'g 9 Hun (N. Y.) 79.

ment, or even a particular employment affecting the public, is said to hold or be in office. However, therefore, the signification of the word used is ascertained, it will comprehend the position of the plaintiff as stated in the record, for although his functions may be those of service, his employment is by the public, and the duties intrusted to him are official and a public charge.”¹

§ 6. **The same subject. Landscape architect, department public works.**—It was held by the superior court of New York city, that a landscape architect in the department of public works, appointed during pleasure by, and responsible only to, the commissioners, was a servant of the commissioners, and not a public officer. The court, after quoting Blackstone’s definition,² added: “Every office under the constitution implies an authority to exercise some portion of the sovereign power of the state, either in making, executing, or administering the laws.”³

§ 7. **The same subject. Assistant clerk; messenger; officer of school district.**—Upon a question respecting an assistant clerk of the board of aldermen of the city of New York, appointed by the clerk of the common council of the city, pursuant to a resolution of that body, Davis, P. J., delivering the opinion of the general term of the supreme court, said: “We see no reason to doubt that the plaintiff was an officer. His duties were those pertaining to an office. He was required by ordinance to take, and did take the official oath; and he was amenable to all the penalties of statute for neglect or violation of official duties. Probably the true test to distinguish officers from simple servants or employees, is the obligation to take the oath

¹ *Rowland v Mayor, etc.*, 83 N. Y. 372, aff’g 44 N. Y. Super. Ct. 559.

See also, *Sweeney v Mayor, etc.*, 5 Daly (N. Y.) 274; aff’d (no op’n) 58 N. Y. 625. *Moser v Mayor, etc.*, 21 Hun (N. Y.) 163; *Holley v Mayor, etc.*, 59 N. Y. 166;

Brennan v Mayor, etc., 62 N. Y. 365; *Wines v Mayor, etc.*, 9 Hun (N. Y.) 659.

² *Ante*, § 2, note 3.

³ *Olmstead v The Mayor, etc.*, 42 N. Y. Super. Ct. 481.

prescribed by law.”¹ But it was held that the messenger of the president of the board of aldermen was not an officer, on the ground that his duties were not official, the court distinguishing this case from the one last cited, on the ground that in the latter, the plaintiff performed some of the official functions of his principal.²

The supreme court of Connecticut, holding that a trustee of a school district is a public officer, expressed the opinion, that every one deriving public functions from an election by the people of a particular district is a public officer.³

And it has been said that one appointed or elected in a manner prescribed by law, having a designation or title given to him by law, and exercising functions concerning the public assigned to him by law, is a public officer.⁴

§ 8. Territorial limits; emoluments; official oath; permanent or transient character of duties.—In considering the question whether a particular officer is a public officer, the extent of the territorial limits within which his functions are exercised is immaterial. If the office is one in which the public have an interest, it is a public office, however narrow may be such territorial limits.⁵ Nor is the existence or absence of any emoluments, or of the requirement of an official oath, or the permanent or transient character of the duties, a certain test to determine whether a person is or is not a public officer.⁶ It

¹ *Collins v Mayor, etc.*, 3 Hun (N. Y.) 680.
See also *Oakley v Mayor, etc.*, 4 Hun (N. Y.) 72; s. c. 6 T. & C. (N. Y.) 221.

² *Smith v Mayor, etc.*, 67 Barb. (N. Y.) 223.

³ *Ogden v Raymond*, 22 Conn. 379; citing *Adams v Whittlesey*, 3 Conn. 560; *Perry v Hyde*, 10 Conn. 329, at p. 338; *Sterling v Peet*, 14 Conn. 245.
See also, as to school officers, *Sanborn v Neal*, 4 Minn. 123;
McCoy v Curtice, 9 Wend. (N. Y.) 17;

Comm. v Morrissey, 86 Pa. St. 416.

⁴ *Bradford v Justices, etc.*, 33 Ga. 332.

⁵ *Reg. v St. Martin's*, 17 Q. B. (Ad. & El., N. S.) 149;

People v Bedell, 2 Hill (N. Y.) 196.

See also, *Vaughan v English*, 8 Cal. 39;
Shelby v Alcorn, 36 Miss. 273;
State v Vallé, 41 Mo. 29, at p. 31.

⁶ *State v Stanley*, 66 N. C. 59.
See also *People v Langdon*, 40 Mich. 673;
State Kennon, 7 Ohio St. 546.

was held in Pennsylvania, that a person appointed and commissioned by the governor, pursuant to a joint resolution of the legislature, a special agent of the state to collect certain claims of the state against the United States, and who was not required to take, and did not take, an official oath, was a public officer, and therefore liable, under a clause in the non-imprisonment act of the state, excepting actions against public officers, to arrest in an action to recover the money received by him. The court held that "all persons, who, by authority of law, are intrusted with the receipt of public moneys, through whose hands money, due to the public or belonging to it, passes on its way to the public treasury, must be so considered, by whatever name or title they may be designated in the law authorizing their appointment, and whether the service be general or special, transient or permanent." ¹

§ 9. **Clergyman; certifying officer; fireman of city; when public officers.**—And it would seem that in certain cases a man may be a public officer, without appointment or election by any public authority, and without an oath of office, legal emoluments, or permanency of tenure or of duties. For it was held by the supreme court of errors of Connecticut that a "clergyman, in the administration of marriage, is a public civil officer, and, in relation to this subject, is not at all distinguished from a judge of the superior or county court or a justice of the peace, in the performance of the same duty;" so that his acts in that capacity are admissible as *prima facie* evidence of his official character.² But where a judge of the court of appeals of the State of New York was designated by a statute of that state, as one of three persons to examine

¹ *Comm. v Evans*, 74 Pa. St. 124, per Sharswood, J., p. 139.

² *Goshen v Stonington*, 4 Conn. 209. See

also, *post*, § 863.

See, however, *Union Church v Sanders*, 1 *Houst. (Del.)* 100.

and report upon the genuineness and value of certain relics, which the state proposed to purchase, and upon whose certificate the purchase price was directed to be paid, it was held that this was not an "office or public trust," which a judge was prohibited to hold by the constitution.¹ In a case decided in the court of appeals of the state of New York, upon the question whether the firemen of the city of New York, under the old system, were public officers, Finch, J., said: "The precise relation of these firemen to the municipality and the state it is not easy to describe. They were not civil or public officers within the constitutional meaning, and yet must be regarded as the agents of the municipal corporation. Their duties were public duties; the service they rendered was a public service; their appointment came from the common council and was evidenced by the certificate of the city officers; they were liable to removal by the authority which appointed them; and were intrusted with the care and management of the apparatus owned by the city. They were, at least, a public body, and, perhaps, are best described as a subordinate government agency."²

§ 10. **Certain persons having public functions held public officers.**—In the following cases, it has been held that the person, whose status was in question in each case, was a public officer, to wit:³ A notary public;⁴ a swamp land agent or commissioner;⁵ a clerk in the state department;⁶ a judge or a justice of the peace;⁷ the surveyor-general and comptroller of the state;⁸ a trustee of the

¹ *People v Nichols*, 52 N. Y. 478.

² *Trustees, etc., v Roome*, 93 N.Y. 313, per Finch, J., pp. 319, 320; aff'g 29 Hun (N. Y.) 391.

See also *Baker v U. S.*, 4 Ct. of Cl. (U. S.) 227, per Nott, J., pp. 232-237; *Comm. v Evans*, 74 Pa. St. 124, per Sharswood, J., pp. 139, 140.

³ See also the cases cited *post*, §§ 33, 39.

⁴ *Kirksey v Bates*, 7 Port. (Ala.) 529; *Governor v Gordon*, 15 Ala. 72.

⁵ *Rice v Harrell*, 24 Ark. 402; *Baugh v Lamb*, 40 Miss. 493.

⁶ *Vaughan v English*, 8 Cala. 39. See also, *U. S. v Hartwell*, 6 Wall (U. S.) 385.

⁷ *People v Ransom*, 58 Cala. 553; *Comm. v Gamble*, 62 Pa. St. 343.

⁸ *People v Whitman*, 10 Cala. 38.

of the state library;¹ the state librarian;² the school superintendent of a county;³ a policeman or a ladder-man of the fire department of a city;⁴ a director of the state deaf and dumb institution;⁵ a police officer;⁶ a county drainage commissioner;⁷ the state printer;⁸ a postmaster;⁹ a trustee of the jury fund;¹⁰ a levee commissioner;¹¹ a member of the board of water commissioners of a city;¹² a representative in the state legislature;¹³ a deputy county clerk;¹⁴ a representative in the congress of the United States;¹⁵ the health officer of the city of New York;¹⁶ an assistant clerk to the board of aldermen, required by law to take an official oath;¹⁷ loan commissioners of a county;¹⁸ commissioners for internal improvements in another state;¹⁹ commissioners to lay out a public road;²⁰ commissioners to erect a public building;²¹ the superintendent of a county penitentiary;²² an interpreter for a municipal court, not of record;²³ a city attorney;²⁴ the tax collector of a village;²⁵ an assessor of taxes;²⁶ a person authorized by statute to appoint to an office, although he receives no compensation, and takes no oath;²⁷

¹ *People v Sanderson*, 30 Cal. 160.

² *People v Stratton*, 28 Cal. 382.

³ *Crawford v Dunbar*, 52 Cal. 36.

⁴ *Farrell v Bridgeport*, 45 Conn. 191;
Wright v Hartford, 50 Conn. 546.

⁵ *Dickson v People*, 17 Ill. 191.

⁶ *Jacksonville v Allen*, 25 Ill. App. 54.

⁷ *State v Wells*, 112 Ind. 237.

⁸ *Ellis v State*, 4 Ind. 1.
Walker v Dunham, 17 Ind. 483.

⁹ *Foltz v Kerlin*, 105 Ind. 221.

¹⁰ *Comm. v Jackson*, 10 Bush (Ky.) 424.

¹¹ *Shelby v Alcorn*, 36 Miss. 273.

¹² *State v Valle*, 41 Mo. 29.

¹³ *Morrill v Haines*, 2 N. H. 246.

¹⁴ *Gibbs v Morgan*, 39 N. J. Eq. 126;
Miller v Lewis, 4 N. Y. 554.

¹⁵ *People v Common Council*, 77 N. Y. 503.

¹⁶ *In re Whiting*, 1 Edm. Sel. Cas. (N. Y.) 498.

¹⁷ *Collins v Mayor, etc.*, 3 Hun (N. Y.) 680.

¹⁸ *In re Carpenter*, 7 Barb. (N. Y.) 30.

¹⁹ *Vose v Reed*, 54 N. Y. 657.

²⁰ *People v Hayes*, 7 How. Pr. (N. Y.) 248;
People v Nostrand, 46 N. Y. 375.

²¹ *People v Comptroller*, 20 Wend. (N. Y.) 595.

²² *Porter v Pillsbury*, 11 How. Pr. (N. Y.) 240.

²³ *Goettman v Mayor, etc.*, 6 Hun (N. Y.) 132.

²⁴ *People v Lee*, 28 Hun (N. Y.) 469.

²⁵ *People v Bedell*, 2 Hill (N. Y.) 196.

²⁶ *Lorillard v Monroe*, 11 N. Y. 392.

²⁷ *State v Stanley*, 66 N. C. 59.

a county treasurer;¹ a commissioner of the United States centennial commission;² a clerk in a local department of the United States treasury;³ an agent of fortifications of the United States;⁴ a marshal of the United States, and a district court of the United States;⁵ commissioners appointed to make a geological survey of a state.⁶ The land office in Pennsylvania is a public office.⁷

§ 11. **Rulings of U. S. Courts as to certain civil officers.**—Numerous rulings have also been made by the courts of the United States, upon the question, whether particular persons employed in the public offices, or by government officers, or otherwise acting with respect to the public business, were entitled under a joint resolution adopted by congress in 1867, to an increase of twenty per centum upon the amount of their compensation, given by the joint resolution to “civil officers” and certain enumerated clerks and employees.⁸

§ 12. **Certain persons with public functions held not public officers.**—In the following cases, it has been held that the particular person, whose status was in question in each case, was not a public officer, either generally, or within the meaning of particular statutory or constitutional provisions, to wit: a sheriff’s special deputy;⁹ a member of a board of commissioners to fund the floating debt of a city;¹⁰ a deputy clerk of the

¹ *Riddle, v Bedford County*, 7 S. & R. (Pa.) 386.

² *In re Corliss*, 11 R. I. 638.

³ *United States v Bloomgart*, 2 Ben. (U. S.) 356.

⁴ *United States v Maurice*, 2 Brock. (U. S.) 96.

⁵ *United States v Strobach*, 4 Woods C. (U. S.) 592.

⁶ *Hall v State*, 39 Wis. 79.

⁷ *Urket v Coryell*, 5 Watts & S. (Pa.) 60.

⁸ *Mallory v U. S.*, 3 Ct. of Cl. 257;
Baker v U. S., 4 Ct. of Cl. 227;

Clapp v U. S., 7 Ct. of Cl. 351;

Huntington v U. S., id., 495;

Pearson v U. S., 9 Ct. of Cl. 152;

Bell v U. S., id. 302;

Park v U. S., id. 315;

Allison v U. S., 10 Ct. of Cl. 449; s. c. p. r., 91 U. S. 303;

Wilson v U. S., 11 Ct. of Cl. 565;

Phillips v U. S., id. 570;

Twenty per cent. cases, 20 Wall, (U. S.) 179;

U. S. v Meigs, 95 U. S. 748.

⁹ *Kavanaugh v State*, 41 Ala. 399.

¹⁰ *People v Middleton*, 28 Cala. 603.

county courts;¹ the treasurer of a city;² a licensed pilot;³ a commissioner to superintend the erection of a building for the state;⁴ a commissioner to superintend the erection of a county building;⁵ a commissioner for the liquidation of an insolvent bank, appointed by the president and stockholders of the bank under a statute;⁶ a police jurymen;⁷ a special deputy sheriff;⁸ firemen in cities and villages, and their various grades of officials;⁹ examiners of buildings appointed by the fire department of a city;¹⁰ a police patrolman;¹¹ a public or state printer;¹² a night watchman of a post-office building, appointed by the United States treasury department;¹³ the members of a water committee, designated by name in a statute, and empowered thereby to purchase water works for a city, and issue the city's bonds therefor;¹⁴ one appointed to print in his newspaper the United States statutes;¹⁵ a deputy collector of the United States internal revenue;¹⁶ a pension agent of the United States;¹⁷ a carrier of the mail, employed by a contractor with the United States, to carry the mail over a mail route;¹⁸ a professor in the state university.¹⁹ Only a few of the Eng-

¹ *Jeffries v Harrington*, 11 Colo. 191.

² *State v Wilmington*, 3 Harr. (Del.) 294.

³ *Dean v Healey*, 66 Ga. 503.

⁴ *Bunn v People*, 45 Ill. 397.

⁵ *McArthur v Nelson*, 81 Ky. 67.

⁶ *Conrey v Copland*, 4 La. Ann. 307.

⁷ *State v Montgomery*, 25 La. Ann. 138.

⁸ *Meyer v Bishop*, 27 N. J. Eq. 141.

⁹ *People v Pinckney*, 32 N. Y. 377;
Exempt Firemen's Fund v Roome, 93
N. Y. 313, aff'g 29 Hun (N. Y.) 391.

¹⁰ *N. Y. Fire Department v Atlas Steam-
ship Comp'y*, 106 N. Y. 566.

¹¹ *Shanley v Brooklyn*, 30 Hun (N. Y.) 396.

See also, *Mangam v Brooklyn*, 98 N. Y.
585.

¹² *Brown v Turner*, 70 N. C. 93.

¹³ *Doyle v Raleigh*, 89 N. C. 133.

¹⁴ *David v Portland*, 14 Oreg. 98.

¹⁵ *Comm. v Binns*, 17 S. & R. (Pa.) 219.

¹⁶ *Landram v United States*, 16 Ct. of Cl.
(U. S.) 74.

¹⁷ *United States v Cutter*, 2 Curtis (U. S.)
617.

See also, *Lindsey v Att'y Gen'l*, 33
Miss. 508.

¹⁸ *Sawyer v Corse*, 17 Gratt. (Va.) 230.

¹⁹ *Butler v Board of Regents*, 32 Wis. 124.

lish cases on the same subject are applicable otherwise than remotely in this country.¹

§ 13. **Whether attorneys, solicitors, and counsellors are public officers.**—With respect to counsellors, barristers, solicitors and attorneys at law, or “public attorneys,” as they are sometimes called, to distinguish them from attorneys in fact or private attorneys,² Lord Chief Justice Holt said: “The office of an attorney concerns the publick, for it is for the administration of justice;”³ and Lord Hardwicke said that they “are to be considered as public officers and ministers of justice.”⁴ Accordingly they are styled, expressly or by implication, public officers, in several cases.⁵ But this ruling has been subjected in practice to so many qualifications, that a more correct expression is, that they are “in a certain sense” public officers.⁶

§ 14. **The same subject.**—Thus in the State of New York, although the statute, enumerating and classifying the “civil officers” of the state, places “counsellors, solicitors and attornies” in the class of judicial officers,⁷ it was held that an attorney was not within the provision vacating a public office, where the incumbent ceases to reside within the state.⁸ And in another case, the court refused to grant an attorney double costs, on his succeeding in an action for directing a sheriff to levy under an

¹ See cases cited *ante* §§ 2, 8;
Also *Att’y Gen’l v Matthias*, 4 Kay & J.
579; 27 L. J., Ch., 761; 4 Jur., N. S., 628;
Hill v Reg., 8 Moore P. C. C. 138.

² *Hall v Sawyer*, 47 Barb. (N. Y.) 116, per
Potter, J.

³ *In re White*, 6 Mod. 18.

⁴ *Walmesley v Booth*, Barn. Ch. 478.

⁵ *Merritt v Lambert*, 10 Paige (N. Y.) 352,
affd. 2 Denio (N. Y.) 607;

Waters v Whittemore, 22 Barb. (N. Y.)
593;

Hall v Sawyer, 47 Barb. (N. Y.) 116;
In re Cooper, 22 N. Y. 67, per Selden, J.,
pp. 92-95;

In re Austin, 5 Rawle (Pa.) 191.

See Blackst. Commen. Book 3, p. 26.

⁶ *Richardson v Brooklyn, etc.*, R. R.
22 How. Pr. (N. Y.) 368, per Emott, J.

⁷ 1 R. S. of N. Y., p. 96; 1 R. S., 8 ed., p.
368.

⁸ *Richardson v Brooklyn, etc.* R. R., 22
How. Pr. (N. Y.) 368

execution issued by him, although the statute allowed double costs to an officer sued for an official act, the court taking the ground that although he was an officer, his act was not official.¹ In an earlier case, where the question arose whether a statute, passed in 1816, requiring every attorney, etc., to take an oath that he had not been engaged in a duel, was abolished by a constitutional provision adopted in 1821, prescribing a general oath for all public officers, and forbidding the requirement of any other oath, the supreme court held that the former statute was still in force, Platt, J., saying, "In my judgment an attorney or counsellor does not hold an office, but exercises a privilege or franchise."² But the chancellor, in a subsequent case, ruled otherwise with respect to solicitors' oaths, holding that solicitors, etc., were public officers;³ and the latter opinion appears to have prevailed in the court of errors, where the question came up in another form.⁴ In the latest reported case, relating to this subject, the supreme court expressly held, that although an attorney is an officer of the court, he is not an officer of the state, and the admission of a person to practice as an attorney, is not the appointment of him to public office.⁵

§ 15. **The same subject.**—And the United States supreme court has held, that attorneys and counsellors, admitted by the United States courts, are not officers of the United States, but officers of the courts.⁶ The supreme court of California has also ruled that an attorney does not hold a "public trust," within the meaning of the constitution.⁷ And the weight of authority, in the modern

¹ *Ray v Birdseye*, 5 Denio (N. Y.) 619.

² *In re the oaths, etc.*, 20 Johns. (N. Y.) 492. See also *ante*, § 4.

³ *In re Wood*, 2 Cow. (N. Y.) 29, note: s. c. *Hopk.* (N. Y.) 7.

⁴ *Seymour v Ellison*, 2 Cow. (N. Y.) 13.

⁵ *In re Burchard*, 27 Hun (N. Y.) 429.

See also *Hamilton v Wright*, 37 N. Y. 502.

⁶ *Ex parte Garland*, 4 Wall. (U. S.) 333.

⁷ *Cohen v Wright*, 22 Cala. 293;
Ex parte Yale, 24 Cala. 241.

American cases, is decidedly in favor of the doctrine, that an attorney, solicitor, or counsellor is not a public officer, except, perhaps, in a limited and special sense¹ or, as a learned judge remarked, in discussing the question, whether a woman could be an attorney: "An attorney at law is not indeed, in the strictest sense, a public officer; but he comes very near it."²

¹ *In re Dorsey*, 16 Ala. (7 Porter) 293;

Ex parte Law, 35 Ga. 285;

Byrne v Stewart, 3 Desau. (S. C.) 466;

Ingersoll v Howard, 1 Heisk. (Tenn.) 247;

In re Leigh, 1 Munf. (Va.) 468;

Ex parte Faulkner, 1 W. Va. 269;

In re Mosness, 39 Wis. 509.

² *In re Robinson*, 131 Mass. 376, per Gray, J.

CHAPTER II

NATURE AND GENERAL INCIDENTS OF A PUBLIC OFFICE

CONTENTS

- SEC. 16. What offices in England are inheritable and assignable, and regarded as incorporeal hereditaments.
17. In the United States no office is a hereditament; general principles relating to this subject.
18. Examination of some American cases where an office is said to be property.
19. Settled doctrine in the United States that an office is not held under a grant or contract, and where the constitution does not otherwise provide, the legislature may change the duties, term, compensation, etc., or abolish it; but if these incidents fixed by constitution, legislature cannot change them. So an office does not create a contract by the officer to serve. Same rule applies to a municipal officer and the municipal legislature.
20. But legislature cannot remove an officer, directly or indirectly; and some cases hold that term cannot be abbreviated, etc. Various rulings respecting the constitutionality of statutes tending indirectly to affect offices regulated by the constitution.
21. An office is a public agency; and so the act of public officers bind the state, etc., but not when power exceeded; government not chargeable for officer's default.

§ 16. **Certain offices inheritable and assignable in England.**—Many ancient offices were, in England, inheritable and assignable, and were treated as incorporeal hereditaments.¹ But these were common law offices, depending chiefly upon usage; and the doctrine did not extend to judicial offices, or other offices pertaining to the

¹ See *ante*, § 2.

administration of justice.¹ Offices created by statute confer no life estate, or irrevocable tenure, unless the statute expressly so provides.²

§ 17. **But in U. S. no office is a hereditament.**—But in this country, no public office can properly be termed a hereditament, or a thing capable of being inherited.³ Here public offices are not the subject of grant or livery. “An appointment to an office is only the execution of a power given by statute, and does not operate in any sense as a transfer of property or franchise from the person who makes the appointment to him who receives it.”⁴ “All public offices emanate from the people, and are governed by the constitutions and the laws.”⁵

§ 18. **In certain American cases office styled property.**—But in some American cases, an office, or the right to exercise an office is styled property, in an absolute and unqualified sense; and it has been said that the right to exercise an office is “as much a species of property as any other thing capable of possession.”⁶ With respect to this remark, a learned judge says that it “was rather a figure of speech, than a judgment, determining an office to be, property. It was a strong mode of expressing the right, which one elected to an office has to hold and enjoy it, as against all intruders and unfounded claims, which

¹ Blackst. Commen., Book 2, ch. 3, p. 36;
9 Coke, 47, 48;
Reynel's Case, 9 Coke, 95 a, 97, *et seq.*

² Smyth v Latham, 9 Bing. 692;
Veale v Priour, Hardres, 351, per Hale,
Ch. B. pp. 356, 357.
For a learned and able statement of
the nature, etc. of offices, see per
Sandford, J., in Conner v Mayor, etc.,
2 Sandf. (N. Y.) 355, at pp. 367, *et seq.*

³ 3 Kent Commen., 454;
State v Davis, 44 Mo. 129;
Conner v Mayor, etc., 2 Sand. (N. Y.)

355, per Sandford, J., p. 368; s. c. on
appeal, 5 N. Y. 285, per Ruggles, Ch.
J., p. 295;

People v Murray, 70 N. Y. 521, per
Allen, J., p. 525.

⁴ People v Murray, 5 Hun (N. Y.) 42.
See also, Donovan v Will County, 100
Ill. 94.

⁵ Conner v Mayor, etc., 2 Sand. (N. Y.)
355, per Sandford, J., p. 368.

⁶ Wammack v Holloway, 2 Ala. 31.
Accord, Hoke v Henderson, 4 Dev. (N.
C.) 1, see pp. 17-19.

is as perfect a right, beyond doubt, as the title of any individual to his property, real or personal. But the nature of that right, and its liability to control by legislative action, is quite a different thing.”¹ And in a recent case in the New York court of appeals, Andrews, J., approving the remarks last cited, adds: “It is true that in this country offices are not hereditaments, nor are they held by grant. The right to hold an office, and to receive the emoluments belonging thereto, does not grow out of any contract with the state, nor is an office property, in the same sense that cattle or land are the property of the owners. . . . An office has a pecuniary value, although primarily it is an agency for public purposes.”²

§ 19. *The doctrine in the United States.*—It is therefore well settled in the United States, that an office is not regarded as held under a grant or a contract, within the general constitutional provision protecting contracts; but, unless the constitution otherwise expressly provides, the legislature has power to increase or vary the duties, or diminish the salary or other compensation appurtenant to the office, or abolish any of its rights or privileges, before the end of the term, or to alter or abridge the term, or to abolish the office itself.³ But if either of

¹ *Conner v Mayor, etc.*, 2 Sand. (N. Y.) 355, per Sandford, J., p. 370.

² *Nichols v MacLean*, 101 N. Y. 526, per Andrews, J., p. 533.

See also *Fitzsimmons v Brooklyn*, 102 N. Y. 536.

³ *Benford v Gibson*, 15 Ala. 521;
Ex parte Lambert, 52 Ala. 79;
Beebe v Robinson, 52 Ala. 66;
Ex parte Lusk, 82 Ala. 519;
Woodruff v State, 3 Ark. 285;
Robinson v White, 26 Ark. 139;
People v Haskell, 5 Cala. 357;
People v Banvard, 27 Cala. 470;
In re Bulger, 45 Cala. 553;
State v Dews, R. M. Charl. (Ga.) 397;

Augusta v Sweeney, 44 Ga. 463;
People v Auditor, 2 Ill. 537;
People v Lippincott, 67 Ill. 333;
Crook v People, 106 Ill. 237;
Coffin v State, 7 Ind. 157;
Turpen v Com'rs, 7 Ind. 172;
Walker v Dunham, 17 Ind. 483;
Walker v Peelle, 18 Ind. 264;
Miami v Blake, 21 Ind. 32;
State v Bell, 116 Ind. 1;
Iowa City v Foster, 10 Iowa 189;
Bryan v Catell, 15 Iowa 538;
Williams v Newport, 12 Bush (Ky.) 438;
Mandell v New Orleans, 21 La. Ann. 9;
Hire v New Orleans, 21 La. Ann. 428;
Evans v Populus, 22 La. Ann. 121;

those incidents of the office is fixed by the constitution, the legislature has no power to alter them, unless the power so to do is expressly reserved to it in the constitution itself.¹ On the other hand the acceptance of the office does not create a contract on the part of the officer to serve during the term fixed by law, and he may deter-

Farwell *v* Rockland, 62 Maine, 296;
 Prince *v* Skillin, 71 Maine 361;
 Mayor *v* State, 15 Md. 376;
 Taft *v* Adams, 3 Gray, (Mass.) 126;
 Op'n of the Just., 117 Mass. 603;
 Knappen *v* Sup'rs, 46 Mich. 22;
 Wyandotte *v* Drennan, 46 Mich. 478;
 Co. Com'rs *v* Jones, 18 Minn. 199;
 State *v* Smedes, 26 Miss. 47;
 Swann *v* Buck, 40 Miss. 268;
 Kendall *v* Canton, 53 Miss. 526;
 Hyde *v* State, 52 Miss. 665;
 Wilcox *v* Rodman, 46 Mo. 322;
 People *v* Van Gaskin, 5 Monta. 352;
 Denver *v* Hobart 10 Neva. 28;
 Marden *v* Portsmouth, 59 N. H. 18;
 Hoboken *v* Gear, 27 N. J. L. 265;
 Love *v* Jersey City, 40 N. J. L. 456;
 Warner *v* People, 2 Denio, (N. Y.) 272;
 Phillips *v* Mayor, etc., 1 Hilt. (N. Y.) 483;
 People *v* Green, 58 N. Y. 295;
 People *v* White, 54 Barb. (N. Y.) 622;
 Palmer *v* Mayor, etc., 2 Sand. (N. Y.) 318;
 Conner *v* Mayor, etc., 2 Sand. (N. Y.) 355, aff'd 5 N. Y. 285;
 People *v* Devlin, 33 N. Y. 269;
 People *v* Whitlock, 92 N. Y. 191;
 Nichols *v* MacLean, 101 N. Y. 526;
 State *v* Gales, 77 N. C. 283;
 State *v* Howe, 25 Ohio St. 588;
 State *v* Hawkins, 44 Ohio St. 98;
 Territory *v* Pyle, 1 Oreg. 149;
 Comm. *v* Bacon, 6 S. & R. (Pa.) 322;
 Comm. *v* Mann, 5 W. & S. (Pa.) 403;
 Smith *v* Philadelphia Co. 2 Pars. Eq. Cases (Pa.) 293;
 Koontz *v* Franklin County, 76 Pa. St. 154;
 Kilgore *v* Magee, 85 Pa. St. 401;

French *v* Comm., 78 Pa. St. 339;
 Alexander *v* McKenzie, 2 S. C. 81;
 Haynes *v* State, 3 Humph. (Tenn.) 480;
 Jones *v* Shaw, 15 Tex. 577;
 Butler *v* Pennsylvania, 10 How. (U. S.) 402;
 Newton *v* Com'rs, 100 U. S. 548, at p. 559;
 Andrews *v* United States, 2 Story (U. S.) 202;
 Fisher *v* United States, 15 Ct. of Cl. (U. S.) 323;
 State *v* Douglass, 26 Wis. 428;
 Hall *v* State, 39 Wis. 79;
 State *v* Kalb, 50 Wis. 178;
 Castle *v* Co. Com'rs, 2 Wyo. 126.
 See also *post*, ch. 19.

¹ *Ex parte* Tully, 4 Ark. 220;
 Robinson *v* Dunn, 77 Cala. 473;
 Howard *v* State, 10 Ind. 99;
 State *v* Thoman, 10 Kan. 191;
 Lowe *v* Comm., 3 Met. (Ky.) 237;
 Thomas *v* Owens, 4 Md. 189;
 Fant *v* Gibbs, 54 Miss. 396;
 State *v* Kelsey, 44 N. J. L. 1;
 People *v* Garey, 6 Cow. (N. Y.) 642;
 aff'd 9 Cow. (N. Y.) 640;
 King *v* Hunter, 65 N. C. 603;
 State *v* Choate, 11 Ohio, 511;
 Walker *v* Cincinnati, 21 Ohio St. 14;
 Comm. *v* Mann, 5 Watts & S. (Pa.) 403;
 Comm. *v* Gamble, 62 Pa. St. 343;
 Brewer *v* Davis, 9 Humph. (Tenn.) 208;
 Foster *v* Jones, 79 Va. 642;
 Att'y Gen'l *v* Marye, 80 Va. 485;
 State *v* Brunst, 26 Wis. 412.

mine the relation at any time.¹ The same rules apply to a city, county, or other municipal officer, and the common council or other legislative body of the municipality, where that body has power by statute to create and regulate the office, without restriction upon its powers or to particular incidents of the office.² So, where the board of supervisors of a county have power to fix the salary of a county officer, its action in so doing does not create a contract between the officer and the county, and the legislature may authorize the board to reduce the salary, as far as it has not already been earned.³

§ 20. Power of legislature to remove officer or abridge term.—But these principles are subject to the qualification that the legislature cannot remove an officer, where the tenure of his office is fixed by the constitution;⁴ and it has also been said that the same result cannot be effected indirectly by transferring the office to another,⁵ or by abbreviating the term; in such a case, the legislature can only abolish the office.⁶ It has also been held, that where the office is created by the constitution, the tenure and compensation being left to be regulated by statute, the legislature cannot virtually abolish the office by a colorable reduction of the compensation, or by taking it away

¹ *Hoboken v Gear*, 27 N. J. L. 265;
United States v Edwards, 1 McLean,
 U. S., 467.
 See also *post*, ch. 17.

² *Augusta v Sweeney*, 44 Ga. 463;
Chicago v Edwards, 58 Ill. 252;
Brazil v McBride, 69 Ind. 244;
Iowa City v Foster, 10 Iowa, 189;
Hiestand v New Orleans, 14 La. Ann.
 329;
Farwell v Rockland, 62 Me. 296;
Marden v Portsmouth, 59 N. H. 18;
Palmer v Mayor, etc., 2 Sand. (N. Y.) 318;
Comm. v Bacon, 6 S. & R. (Pa.) 322;
Barker v Pittsburg, 4 Pa. St. 49.

See also *post*, ch. 19.

³ *Knappen v Sup'rs*, 46 Mich. 22;
S. P. Wyandotte v Drennan, 46 Mich.
 478;
Castle v Co. Com'rs, 2 Wyo. 126.

⁴ *Cotten v Ellis*, 7 Jones L. (N. C.) 545.
 See, however, *Comm. v Southerland*, 3
 S. & R. (Pa.) 145.
Compare State v Davis, 44 Mo. 129;
People v Van Gaskin, 5 Monta. 352.

⁵ *Hoke v Henderson*, 4 Dev. (N. C.) 1.
 Contra, *semble*, *Att'y Gen'l v Squires*, 14
 Cala. 12.

⁶ *State v Wiltz*, 11 La. Ann. 439.

altogether.¹ And where the constitution of a state requires certain officers to be elected by the people, and authorizes the legislature to fix the term of office, and the manner and time of election, if the legislature has prescribed the duration of the office, and the office has been filled accordingly, a statute extending the term of the incumbent is unconstitutional; for if the legislature thinks proper to extend the term, it must direct an election by the people for the increased time. But a statute changing the time of the election, or extending the term of an officer thereafter to be elected is constitutional.² Nor can the legislature take from the officer the substance of the office and transfer it to another, to be appointed in a different manner, and to hold by a different tenure;³ although the name of the office is changed, or the office divided, and the duties assigned to two or more officers under different names.⁴ Nor can the constitutional term of office of a justice of the peace be indirectly shortened by the legislature, by altering the bounds of the town or county.⁵ But this rule extends only to those who are in office when the new statute takes effect; and if the legislature merges a town into an adjoining city, a person who has been elected a justice of the peace of the town, but whose term of office has not begun when the merging statute takes effect, is remediless.⁶

§ 21. **What official acts bind the state.**—As an office is a public agency, it follows that, in the absence of fraud or

¹ *Conner v Mayor, etc.*, 2 Sand. (N. Y.) 355, per Sanford, J., per 369.

See s. c., aff'd on appeal, 5 N. Y. 235.

² *People v Bull*, 46 N. Y. 57;

People v McKinney, 52 N. Y. 374.

See, however, *People v Batchelor*, 22 N.

Y. 123, per Selden, J. pp. 135-137.

³ *Warner v People*, 2 Denio (N. Y.) 272.

See, however, *Att'y Gen'l v Squires*, 14 Cal. 12.

⁴ *People v Albertson*, 55 N. Y. 50.

⁵ *Ex parte McCollum*, 1 Cow. (N. Y.) 550; *People v Garey*, 6 Cow. (N. Y.) 642, aff'd, p. r. 9 Cow. 640.

See also, *People v Morrell*, 21 Wend. (N. Y.) 563;

People v Hayt, 7 Hun (N. Y.) 39, rev'd on another point, 66 N. Y. 606.

⁶ *Gertum v Supervisors*, 109 N. Y. 170.

collusion, the acts of public officers acting in behalf of the state, within the limits of the authority conferred on them, and in the performance of their duties, are the acts of the state, and cannot be repudiated by it.¹ Such acts can be reviewed only by the courts, not by the legislature.² But where an officer acts beyond his authority no legal claim is created, and an auditing officer is not authorized to audit such a claim.³ And the failure of an officer to discharge a duty imposed on him by law does not charge the government with any loss caused by his default.⁴

¹ *People v Stephens*, 71 N. Y. 527.

See, further, upon this subject, *post*, § 551.

² *State v Hastings*, 12 Wis. 596.

See also *post*, § 551.

³ *Boyers v Crane*, 1 W. Va. 176.

⁴ *Schmalz v United States*, 4 Ct. of Cl. (U. S.) 142.

CHAPTER III

CLASSIFICATION OF PUBLIC OFFICERS

CONTENTS

- SEC. 22. General classification by Bacon ; by Judge Clifford.
 23. General classification by Judge Cooley.
 24. Criticism upon those classifications; town tax collector; state auditor; county solicitor.
 25. These classification are of minor importance; question generally is as to the nature of the power exercised in each case; that question considered in ch. 23.
 26. Classification into general and local officers, with reference to constitutional and statutory provisions affecting generally such officers; rulings thereupon.
 27. Whether a justice of the peace in New York is a town officer or a county officer.
 28. Constitutionality of statutes creating districts, consisting of several cities, towns, etc., with reference to same question.
 29. Miscellaneous rulings as to whether particular officers are general or local officers.

§ 22. **General classification by Bacon; by Judge Clifford.**—Officers are classified by Bacon into (1) civil and military; (2) public and private; (3) ancient and those of a new creation; (4) judicial and ministerial.¹

This classification is only partially applicable in this country. The third class depends upon rules and customs which have never been recognized here;² and the fourth class requires the addition of at least two more kinds,—the legislative and the political or executive, although the author intended the latter to be included in

¹ Bacon's Abr., tit. Offices and Officers, A.

See also Tomlin's L. Dict., tit. Office, and cases cited.

² *Ante*, § 16.

the word ministerial, which was not used in the narrow sense attributed to it by some American jurists. One of the justices of the supreme court of the United States has classified officers as follows:¹ "Offices may be and usually are divided into two classes—civil and military. Civil offices are also usually divided into three classes—political, judicial and ministerial. Political offices are such as are not immediately connected with the administration of justice, or with the execution of the mandates of a superior, as the president or head of a department. Judicial offices are those which relate to the administration of justice, and which must be exercised by the persons appointed for that purpose, and not by deputies. Ministerial offices are those which give the officer no power to judge of the matter to be done, and which require him to obey some superior."²

§ 23. **General classification by Judge Cooley.**—An eminent judge and legal author has thus written concerning the classification of public offices. "A public office is a public trust. The incumbent has a property right in it, but the office is conferred, not for his benefit, but for the benefit of the political society. The duties imposed upon the officer are supposed to be capable of classification under one of these heads: the legislative, executive, or judicial; and to pertain accordingly to one of the three departments of the government designated by those names. But the classification cannot be very exact, and there are numerous officers who cannot be classified at all under these heads. The reason will be apparent, if we name one class as an illustration. Taxing officers perform duties which in strictness are neither executive nor judicial, though in some particulars they merely execute the orders of superiors, and in others they judge for them-

¹ Twenty per cent. cases, 13 Wall. (U. S.) 588, per Clifford, J., p. 575.

² See also *Fitzpatrick v United States*, 7 Ct. of Cl. (U. S.) 290; *State v Taylor*, 12 Ohio St., 130.

selves what is to be done. But sometimes, also their duties partake of the legislative. All such officers are usually called administrative, while inferior executive officers are designated ministerial.”¹

§ 24. **Criticism upon foregoing; town tax collector; auditor, etc.**—The foregoing attempts at classification it will be seen, are far from being uniform and harmonious. A learned judge of the court of appeals of New York has said: “The collector of a town is an executive officer. He is clothed with a subordinate, though important agency in the execution of the laws. He can seize and sell the property of the citizen, as a means of enforcing the payment of taxes which he is authorized to collect. He exercises a ministerial, as distinguished from a judicial power; but his duties are executive.”² So it was held by the supreme court of North Carolina that the auditor of the state is not a mere ministerial officer, as he is to pass upon the correctness of claims presented, to determine whether there is sufficient provision of law for the payment thereof, and if he determines that there is none, to report the facts to the general assembly, with his opinion, neither of which duties is ministerial, although his general duties are ministerial.³ On the other hand, it was held by the supreme court of Alabama, that a county solicitor is within a statute punishing a “ministerial officer” for receiving a bribe. The court said: “If a county solicitor is not a ministerial officer, it would be difficult, if not impossible, to define his character: all the duties with which

¹ Hon. Thos. M. Cooley, in *The Southern Law Review*, vol. 3, N. S., p. 531. In some states a classification of officers has been made by statute. The R. S. of New York, which took effect January 1, 1830, classify the officers within the state as follows: (1) legislative officers; (2) executive officers; (3) judicial officers; (4) administrative

officers; and enumerate those officers which belong to each class respectively. So many changes have since been made in the offices of that state, that the classification is now in many respects inapplicable.

² *People v McKinney*, 52 N. Y. 374, per Andrews, J., p. 380.

³ *Boner v Adams*, 65 N. C. 639.

he is charged pertain to the protection of the state and the general administration of the criminal laws. He attends on the grand jury, as their legal adviser; draws the indictments they may find; prosecutes all indictable offences; and prosecutes or defends any civil action to which the state is a party, pending in the circuit court. No one of these duties involves executive or judicial functions. They are purely ministerial."¹

§ 25. **General classifications of minor importance.**—Except for the purpose of construing some constitutional or statutory provision, relating generally to officers of a particular description, the classification of officers, in accordance with the general character of their functions, is of little practical importance, inasmuch as whenever any other question arises, in which it becomes material to determine the character of an officer's functions, its solution depends, not upon the general character of his functions, but upon the character of the particular function which was or was not exercised in the particular case. Judicial or *quasi* judicial powers are often conferred upon officers, whose general functions are executive or ministerial, and merely executive or ministerial functions are often conferred upon those whose general functions are judicial. So executive, ministerial, or even judicial powers are often conferred upon a body of officers, whose general functions are legislative. The important point to be determined is, therefore, what is the character of particular powers exercised by officers in particular cases. This question is often difficult of solution; but we will give, in a subsequent chapter,² such general principles, and such rulings in particular cases, as may be found in the books, for the purpose of determining that question, when it arises.

¹ *Diggs v State*, 49 Ala. 311, per Brickell, ² *Post*, ch. 23.
J., pp. 320, 321.

§ 26. **Classification into general and local officers.**—Another kind of classification often becomes important in construing constitutional and statutory provisions, relating to local, as distinguished from general officers. The constitutions of many of the states contain provisions regulating the mode of election or appointment of, and the exercise of official functions by, county, town, city, or village officers; so that the question is sometimes presented whether a particular officer comes within either of those designations. And similar questions have arisen with respect to the application of statutes containing similar general expressions. Thus, upon the question whether the health officer of the port of New York was a city or a county officer, within the provisions of the state constitution, regulating the filling of vacancies in offices of those descriptions—a question which was complicated by the fact that the city of New York and the county of New York are co-extensive—it was held that he was neither a city nor a county officer, because he was not required “to reside in this city and county, but the due performance of his duties in fact requires his residence out of the county; and his functions are to be exercised out of, as well as within, the city and county. . . . ‘County officers,’ within the meaning of the constitution, would comprehend all those who are appointed or elected for a county, and must reside, and perform the duties of their offices, within their counties, such as sheriffs, coroners, county clerks, etc. ‘City, town, or village officers,’ are such as unite the same requisites in respect to their localities, as mayor, recorder, aldermen and the like.”¹ These definitions were adopted in a subsequent case, where the question was, whether the commissioners, for the several counties in the state, to loan the United States deposit fund, were county officers; and it was held that

¹ *In re Whiting*, 2 Barb. (N. Y.) 513. The place “out of the county” referred

to in the opinion is the quarantine station.

they were such officers, and consequently that the constitution of 1846 took away the power of appointment of loan commissioners from the governor and senate, and transferred it to the county authorities. The court remarked: "They have been required to keep their office in the county, to loan moneys only to inhabitants of the county, to be themselves freeholders and residents of the county, in order to be eligible to the office, and to forfeit their office on removing from the county." ¹

§ 27. **Is a justice of the peace in New York a town or county officer.**—The question also arose in New York, whether a justice of the peace is a town or a county officer, within the provisions of the state constitution referring to such officers. Under the first constitution of the state, adopted in 1777, justices of the peace were appointed by a state council of appointment. Under the second constitution, adopted in 1821, they were appointed, in each county, by the board of supervisors of the county and the judges of the county courts. By an amendment to the second constitution, adopted in 1826, it was provided that thereafter justices of the peace for each town should be elected by the electors of the town; and the same mode of choosing them was prescribed by the third constitution, adopted in 1846, which also directed the election to be held at the annual town meeting. This provision has continued in force till the present time. Before 1826, justices of the peace were regarded as county officers, but after that year the question arose whether they were county officers or town officers, and this question led to a difference of opinion in the courts. In a case where it was held that they were county officers, the court said:

¹ *In re Carpenter*, 7 Barb. (N. Y.) 30.

See also *People v Bennett*, 54 Barb. (N. Y.) 480.

It was held in Ohio that a constitutional provision, requiring county

and township officers to be elected, did not extend to city and village officers. *State v Covington*, 29 Ohio St. 102.

“A justice of the peace is in no proper sense a town officer. True, he is elected by the electors of the town, and by removing therefrom his office becomes vacant. He cannot try civil causes beyond the limits of his town. But his jurisdiction is co-extensive with the county in which he resides; and he can transact criminal business in any town of the county. As in the case of other officers, strictly town officers, a vacancy in the office cannot be supplied at a special town meeting. Town officers may take the oath of office before a commissioner of deeds, or a justice of the peace, or a town clerk in their own town. A justice of the peace is to take the oath of office before a clerk of the county.”¹ But it has since been settled by the decision of the court of last resort, that justices of the peace are town officers.²

§ 28. **Constitutionality of statutes creating districts.**—The same constitutional provisions formed the principal ground of the controversy, respecting the constitutionality of certain acts of the New York legislature, establishing districts, consisting of several cities, towns, etc., for police purposes, whereby the powers of the local authorities, as to police, fire, or sanitary regulations, were transferred to boards of commissioners appointed by the governor and senate, or otherwise than by the local authorities or by popular elections. And it was held by the court of last resort that such acts were constitutional, if the territory embraced in the district consisted of contiguous towns, cities, etc.; and nothing appeared upon the face of the statute to show that the creation of the new district was unnecessary, or an evasion of the constitu-

¹ *People v Keeler*, 25 Barb. (N. Y.) 421, per Wright, P. J., p. 426; reversed, s. c. 17 N. Y. 370, but without expressly deciding this question.

² *Gertum v Supervisors*, 109 N. Y. 170.
For other New York cases in which the same question arose, see *People*

v Garey, 6 Cow. 642, aff'd 9 Cow. 640, as *Garey v People*, etc.;
Gurnsey v Lovell, 9 Wend. 819;
Ex parte McCollum, 1 Cow. 550;
Schroepel v Taylor, 10 Wend. 196;
People v Thurston, 2 Park. Cr. 49;
People v Crawford, 7 Alb. L. J. 204.

tional requirement.¹ But where the new district consisted of a city, and some fragments of adjoining territory, of little extent or population, it was held that the act creating it was an evasion of the constitution, and so unconstitutional, and that if such fragments of territory were to be brought within a municipal police system, the boundaries of the city ought to have been extended so as to take them in.² These provisions of the constitution were not violated by a statute authorizing the laying out of parks for the city of New York in the adjacent district of Westchester county, and extending the jurisdiction of the department of public parks over the territory so acquired.³

§ 29. **Miscellaneous rulings.**—The commissioners of a police district, created as stated in the last section, although appointed by the governor and senate, are not state officers. The expression “state officers” designates those only who are connected with the government of the state, and whom it is the duty of the attorney-general to appear for and defend.⁴ So an officer elected under a municipal charter is not a state officer.⁵ And an officer of a municipal court is not a city officer, but a judicial officer, embraced within the judicial system of the state.⁶

¹ *People v Draper*, 15 N. Y. 532; aff'g 25 Barb. (N. Y.) 344;

People v Shepard, 36 N. Y. 285, as explained, and disapproved, in *People v Albertson*, 55 N. Y. 50.

See also *People v Pinckney*, 32 N. Y. 377; *Metropolitan Board of Health v Heister*, 37 N. Y. 661.

But a provision authorizing the board so created to appoint officers, whose duties are strictly local, is unconstitutional. *Devoy v Mayor, etc.*, 36 N. Y. 449; aff'g 39 Barb. (N. Y.) 169. *Acc.*, *Harbeck v Mayor, etc.*, 10 Bos. (N. Y.) 366.

² *People v Albertson*, 55 N. Y. 50.

³ *In re the Mayor, etc.*, 99 N. Y. 569, aff'g

34 Hun (N. Y.) 441.

⁴ *N. Y. & Harlem R.R. Co. v Mayor, etc.*, 1 Hilt. (N. Y.) 562, per Hilton, J., 584.

⁵ *Britton v Steber*, 62 Mo. 370. *Accord*, *Mohan v Jackson*, 52 Ind. 599; *People v Conover*, 17 N. Y. 64.

⁶ *Whitmore v Mayor, etc.*, 67 N. Y., 21, aff'g 5 Hun (N. Y.) 195; *Goettman v Mayor, etc.*, 6 Hun (N. Y.) 132; *Quinn v Mayor, etc.*, 44 How. Pr. (N. Y.) 266, aff'd 53 N. Y. 627; *Landon v Mayor, etc.*, 39 N. Y. Super Ct. 467;

Contra, *People v Henry*, 62 Cal. 557.

On the other hand, the tax officers of a city are city officers, and the legislature cannot, by changing the names and modes of performing their duties, vest the appointment of such officers in the governor and senate, where the constitution requires city officers to be elected by the people, or appointed by the local authorities.'

¹ *People v Raymond*, 37 N. Y. 428.

· See *People ex rel Brown v Woodruff*,
32 N. Y. 355.

CHAPTER IV

TWO OR MORE OFFICES HELD BY ONE PERSON

CONTENTS

- SEC. 30. Common law fixes no limit to offices held by one person, if compatible; but if not compatible the first is relinquished, although the superior; what exceptions to the rule are admitted.
31. Where not otherwise provided by constitution or statute, the same general rule obtains in this county; rule as to the exceptions. The acceptance of, not the election or appointment to the second office, determines the first. Various illustrations.
32. Exceptions where a penalty is incurred by failure to accept the second office; and where the appointment to the second office is void.
33. General rules to determine whether two offices are or are not compatible.
34. The same subject; case where one held offices of member of legislature and deputy clerk of a court.
35. Various English rulings as to the compatibility or incompatibility of particular offices.
36. Various American rulings that particular offices are incompatible.
37. Various American rulings that particular offices are not incompatible.
38. Rulings upon constitutional or statutory prohibitions against holding two or more offices, etc.
39. Rulings upon constitutional or statutory prohibitions against simultaneously holding an office under the state and one under the United States.
40. The same subject.

§ 30. **The common law rule.**—At common law, there is no limit to the number of offices which may be held simultaneously by the same person, provided that neither of them is incompatible with any other; and this rule ex-

tends to offices of the highest grade, and which involve, for their adequate performance, the greatest expenditure of time and labor. Thus "Knevit was chief justice and chancellor together in the time of Edward III, and Lord Hardwicke in the time of George II." ¹ Formerly it was held that where a man had two incompatible offices, he retained the superior and vacated the inferior; but now the rule is well settled that "if two offices are incompatible, by the acceptance of the latter, the first is relinquished or vacant, even though it should be a superior office." ² And it has been said that "the grant of an office to one, who has another office incompatible, is not good, for the first office will thereby be void." ³ But this proposition is not sustained by the authorities. There are two exceptions to the rule that the acceptance of a second office, incompatible with the first, vacates the latter. The first is, where a custom has legalized the holding of both; as in a case where the court refused to oust the party from the first office, because it appeared that both had been held together for one hundred years. ⁴ The second is that an officer cannot vacate his office by accepting an incompatible office, unless he might have determined the first office by his own act, or unless the authority which could accept his surrender of, or remove him from, the first office, concurred. ⁵

§ 31. The rule in this country, and illustrations.—In many of the states of the Union, it is expressly forbidden by the constitution or by statute, that one person should

¹ Com. Dig., tit. Officer, B 6, note.

See, also, *Rex v Patteson*, 4 B. & Ad. 9;
Rex v Hughes, 5 B. & C. 886.

² *Milward v Thacher*, 2 T. R. (D. & E.) 81;

³ Com. Dig. tit. Officer, B. 6.

Rex v Pateman, 2 T. R. (D. & E.) 777;

⁴ *Rex v Trelawney*, 3 Burr. 1616.

In re Dyer, Dy. 158, b;

See also, *post*, § 35.

Rex v Jones, 1 B. & Ad. 677;

Rex v Tizzard, 9 B. & C. 418;

⁵ *Rex v Patteson*, 1 N. & M. 612; 4 B. & Ad. 9;

Com. Dig., tit. Officer, K 5.

Worth v Newton, 10 Exch. 247; 23 L. J. Exch. 338,

hold two public offices under the state government, and that an officer under the state government should hold office under the United States government. But wherever no such prohibition exists, or in cases to which it does not apply, the courts within the United States uniformly recognize and apply the common law rule, but without the first exception, which is inconsistent with our political institutions.¹ The existence of the second exception depends upon the question whether an officer has or has not an absolute right to resign, which is considered in a subsequent chapter.² As far as it has been presented, that exception seems to be recognized here also.³ It is, however, the acceptance of, not the election or appointment to, an incompatible office, which vacates the first office; and that result follows from such acceptance, without any legal proceedings to oust the party from his first office.⁴ Where a person is elected at a town meeting to two incompatible offices, an acceptance of either is a declension of the other.⁵ Where a person was elected by the people to a municipal office on the 5th of the month, and qualified on the 13th, and on the 13th was

¹ *State v Curran*, 10 Ark. 142;
Magie v Stoddard, 25 Conn. 565;
People v Hanifan, 96 Ill. 420;
Foltz v Kevlin, 105 Ind. 221;
State v West, 33 La. Ann. 1261;
Stubbs v Lee, 64 Me. 195;
Pooler v Reed, 73 Me. 129;
Kenney v Goergen, 36 Minn. 190;
Cotton v Phillips, 56 N. H. 220;
People v Carrique, 2 Hill (N. Y.) 93;
People v Nostrand, 46 N. Y. 375;
State v Goff, 15 R. I., 505;
Biencourt v Pasker, 27 Tex. 558, and the numerous cases hereinafter cited.

² *Post*, §§ 409-413.

³ *State v Brinkerhoff*, 66 Tex. 45.

⁴ *People v Hanifan*, 96 Ill. 420;
State v Dellwood, 33 La. Ann. 1229

State v West, 33 La. Ann. 1261;
Stubbs v Lee, 64 Me. 195;
Pooler v Reed, 73 Me. 129;
State v Draper, 45 Mo. 355;
People v Carrique, 2 Hill (N. Y.) 93;
State v Buttz, 9 S. C. 158. But it was held in Pennsylvania, upon quo warranto to oust a person from a state office, on the ground that he also held an office under the United States, contrary to a constitutional provision, that his resignation and surrender of the federal office, before answer, rendered him competent to hold the state office, and thus prevented an ouster. *DeTurk v Comm.*, 129 Pa. St. 151.

⁵ *Cotton v Phillips*, 56 N. H. 220.

elected by the common council to an incompatible office, and qualified for that office on the 14th, it was held that he vacated the first office by qualifying for the second; and that it made no difference that the appointment for the second was made before he qualified for the first, and that he was chosen to one office by the people, and to the other by the common council.¹ But where the constitution or a statute of a state provides that an officer shall hold over until his successor is chosen, or imposes certain duties upon an officer, to be performed after the expiration of his term, his performance of official duties does not constitute such a continued holding of the first office, as will suffice to oust him from the second.² So a coroner does not vacate his office by acting in place of a sheriff, where the latter is disqualified.³ Where the person elected or appointed to the second office continues to perform the duties of the first office, after qualifying for the second, such performance does not affect the conclusive character of his qualification, as an acceptance of the second.⁴

§ 32. **Exceptions when penalty is incurred or second appointment void.**—Another exception to the rule has been stated, to wit: that where an officer, appointed by a board, is bound to accept the appointment under a penalty, his doing so does not vacate an office previously held by him; as in the case of an inspector of election in the city of New York, appointed by the board of police of that city; because, if such was the effect of his acceptance, “it would, in effect, authorize the board of police to vacate the office held by the person selected.”⁵ An exception also occurs where the second office is conferred by an appointment in violation of a statute. Thus where

¹ *State v Brinkerhoff*, 66 Tex. 45.

² *State v Somers*, 96 N. C. 467.

³ *Powell v Wilson*, 16 Tex. 59.

See also *Dukes v State*, 11 Ind. 557.

⁴ *People v Carrique*, 2 Hill (N. Y.) 93.

⁵ *Goettman v Mayor, etc.*, 6 Hun (N. Y.) 132, per Brady, J.

See, however, *post*, § 167.

a statute rendered the members of a city council ineligible to certain offices, it was held that the appointment by the council of one of its members to such an office, and his acceptance thereof, did not effect an abandonment or forfeiture of the office of councilman, because the appointment was absolutely void.¹

§ 33. **General rule for determining compatibility.**—The question, whether two offices are or are not incompatible, is often difficult of solution, and the principles upon which its solution depends, cannot always be stated with perfect exactness. “The general questions concerning incompatibility of offices are a large field indeed;”² and in many instances each case must be judged by its own peculiar circumstances.³ A learned American judge, discussing this question, has forcibly said, that it has been erroneously supposed from the remarks of Lord Tenterden in *Rex v Jones* (1 B. & Adol. 677), that in order to render two offices incompatible, there must be some such relation between them as that of master and servant—that one must have “controlment” of the other; or that one must be charged with the duty of auditing or supervising the accounts of the other; or that one must be chosen by, or have the power of removal of the other. But these are only instances of incompatible offices, not definitions; and therefore it does not follow that these are all the instances in which offices are incompatible. Thus a judicial office and a ministerial office are incompatible. And in *Rex v Tizzard* (9 B. & C., 418), Bayley, J., gave another instance of incompatibility, when he said “I think that the two offices are incompatible, when the holder cannot in every instance discharge the duties of each.” In 5th Bacon’s Abridgment, (*Title Offices*; K.) we

¹ *State v Kearns*, 47 Ohio St. 566.

² *Rex v Jones*, 1 B. & Ad. 677, per Taunton, J., p. 683.

³ Per Lord Mansfield, Ch. J. in *Rex v Gayer*, 1 Burr. 246.

find the rule laid down, upon the authority of Lord Coke, in these words: "Offices are said to be incompatible and inconsistent, so as not to be executed by the same person, when from the multiplicity of business in them they cannot be executed with care and ability, or when, their being subordinate and interfering with each other, it induces a presumption that they cannot be executed with impartiality and honesty." And in Dillon on Municipal Corporations (§ 166, *note*), it is said, that "incompatibility in offices exists, where the nature and duty of the two offices are such as to render it improper, from considerations of public policy, for one incumbent to retain both." ¹

§ 34. **Same subject; case of member legislature and deputy clerk.**—In a case in New York, wherein the question, was whether the office of member of assembly is incompatible with that of deputy clerk of the court of special sessions, the principles, upon which the doctrine of incompatibility depends, were discussed at length, and the cases were fully examined, in the court of common pleas of the city and county of New York." The judgment of that court was reversed upon appeal, but upon a point not involving this question. The following is an extract from the opinion of the appellate court: "Nor is the office of a member of assembly in the legal sense of the word, incompatible with that of deputy clerk of the court of special sessions of the city and county of New York. After the exhaustive opinions delivered in the court below upon this point, it would be an unwarrantable use of time to go over the ground again, so well explored in them. It may be granted that it was physically impossible for the relator to be present in his seat in the assembly chamber, in the performance of his duty as a member

¹ Abridged from the opinion of McIver, A. J. in *State v Buttz*, 9 S. C. 156. See pp. 182-184.

² *People v Green*, 5 Daly (N. Y.) 254; 46 How. Pr. (N. Y.) 169.

of that body, and at the same time at his desk in the court, doing his duty as deputy clerk thereof. But it is clearly shown in those opinions, that physical impossibility is not the incompatibility of the common law, which existing, one office is *ipso facto* vacated by accepting another. Incompatibility between two offices is an inconsistency between the functions of the two; as judge and clerk of the same court; officer who presents his personal account subject to audit, and officer whose duty it is to audit it. The case of *Bryant* (4 T. R. 715 and 5 id. 509), cited by the appellant, does not conflict with this view. It was decided upon the meaning of the particular statute, which required the personal presence of the officer at the prison. Where one office is not subordinate to the other, nor the relations of the one to the other such as are inconsistent and repugnant, there is not that incompatibility from which the law declares that the acceptance of the one is the vacation of the other. The force of the word in its application to this matter, is that, from the nature and relations to each other of the two places, they ought not to be held by the same person, from the contrariety and antagonism which would result in the attempt by one person to faithfully and impartially discharge the duties of one, toward the incumbent of the other. Thus a man may not be landlord and tenant of the same premises. He may be landlord of one farm and tenant of another, though he may not at the same hour be able to do the duty of each relation. The offices must subordinate, one the other, and they must, *per se*, have the right to interfere, one with the other, before they are incompatible at common law.”¹

¹ *People v Green*, 58 N. Y. 295, per Folger, Ch. J. pp., 304, 305.
See further on this subject, *Bryan v Cattell*, 15 Iowa, 538;

Stubbs v Lee, 64 Me. 195;
State v Brown, 5 R. I., 1;
State v Goff, 15 R. I. 505.

§ 35. **Various English rulings as to compatibility.**—We will now consider some of the rulings of the English and American courts on the subject of the compatibility or incompatibility of particular offices. In England it has been held that a justice of the C. B. cannot be also a justice of the B. R., because the B. R. corrects the errors of the C. B.; but if the chief justice of the C. B. is made keeper of the great seal, he continues to be chief justice; and so a justice of the C. B. may be chief baron of the exchequer.¹ So the offices of alderman and chamberlain of a municipal corporation are incompatible because the aldermen audit the chamberlain's accounts.² So "if a forester by patent for life be made justice in eyre of the same forest *pro hac vice*, the office of forester will be void, for it is incompatible, being subject to correction by the justices in eyre; so if the warden of a forest be made justice in eyre; or the steward or justice of the forest be made justice in eyre."³ If the remembrancer of the exchequer be made a baron of the exchequer, the first office becomes void; so if a town clerk be made alderman or mayor; or if a jurat be elected town clerk; or if a forester, keeper of a walk, or other inferior officer in a forest, accept of being verderor; so a justice of B. R. or C. B. cannot take another office or fee except of the king; so the chief justice of C. B. cannot be prothonotary or clerk of the papers in the same court; so a bishop cannot have a benefice by *commendam* in his own diocese, for he cannot visit himself. By a custom, the same person may be a judge and an officer to execute process, for he acts in different respects, as when bailiffs, or mayor and bailiffs, are judges in the court of a borough, they may also be officers to execute the process of the same court; and a mayor who is a judge of the court may also be the gaoler

¹ Com. Dig., tit. Officer, B 6, and cases cited.

See also *ante*, § 30.

² *In re Blissell*, note to Dougl. 398.

³ Com. Dig., tit. Officer, B 6; 4 Inst. 310.

who has the custody of the prisoners committed by the same court.¹ And the offices of town clerk and common councilman in a borough, where the common councilmen enact by-laws, but do not hold any judicial office, nor do they audit the town clerk's accounts, are not incompatible.² But in a borough where the town clerk is appointed and removed at pleasure by the mayor, aldermen, and bailiffs, who also fix and may alter his salary, and whose meetings he must attend, and prepare minutes thereof, the offices of alderman and town clerk are incompatible.³

§ 36. **Various American rulings as to incompatibility.**—Turning to the cases in this country, we cite the following, in addition to those hereinbefore given in detail, where it was held that two or more offices were so incompatible, that they could not be held simultaneously by the same person, to wit: justice of the peace, and treasurer of the state;⁴ sheriff or deputy sheriff, and justice of the peace;⁵ constable, and justice of the peace;⁶ county recorder, and county commissioner;⁷ reporter of the supreme court or county auditor, and colonel of volunteers;⁸ postmaster, and township trustee;⁹ paymaster in the army, and clerk of the county court;¹⁰ postmaster and judge of the county court;¹¹ jury commissioner, and member of the parish school board, or tax assessor for the parish, or member of the police jury;¹² sheriff or deputy sheriff, or coroner, and justice of the peace;¹³ judge and member of the legisla-

¹ Com. Dig., tit. Officer, B 6, and cases cited.

² *Rex v Jones*, 1 B. & Ad. 677.

³ *Rex v Tizzard*, 9 B. & C. 418.

⁴ *State v Hutt*, 2 Ark. 282.

⁵ *State Bank v Curran*, 10 Ark. 142;
Wilson v King, 3 Littell (Ky.) 457.

⁶ *Magie v Stoddard*, 25 Conn. 565;
Pooler v Reed, 73 Me. 129.

⁷ *Dailey v State*, 8 Blackf. (Ind.) 329

⁸ *Kerr v Jones*, 19 Ind. 351;
Mehringer v State, 20 Ind. 103.

⁹ *Foltz v Kerlin*, 105 Ind. 221.

¹⁰ *Taylor v Comm.*, 3 J.J. Marsh (Ky.) 401.

¹¹ *Hoglan v Carpenter*, 4 Bush (Ky.) 89.

¹² *State v Dellwood*, 33 La. Ann. 1229;
State v. West, 33 La. Ann. 1261.

¹³ *Answer of the Just.*, 3 Me. 484, at p. 486;
Stubbs v Lee, 64 Me. 195.

ture;¹ prudential committee, and auditor of a school district;² councilman, and marshal of a city;³ justice of the district court, and deputy sheriff;⁴ solicitor of a judicial district, and representative in congress;⁵ city secretary, and city recorder;⁶ deputy county clerk, and justice of the peace.⁷

§ 37. **Various American rulings as to compatibility.**—On the other hand, it has been held that the following offices are compatible with each other, so that both may be held simultaneously by the same person, to wit: state senator, and secretary of state;⁸ supervisor, and circuit court clerk;⁹ town marshal, and bailiff;¹⁰ justice of the peace, and city clerk;¹¹ district attorney, and captain of volunteers during a war;¹² register of deeds, and trial justice, or justice of the quorum;¹³ justice of the peace, and constable;¹⁴ county clerk, and clerk of the circuit court;¹⁵ clerk and collector of a school district;¹⁶ member of the legislature, and deputy clerk of a municipal court;¹⁷ inspector of election, and interpreter of a municipal court;¹⁸ one appointed to print the United States laws in his newspaper, and alderman of Philadelphia;¹⁹ school director, and judge of election.²⁰ So the same person may

¹ *Woodside v Wagg*, 71 Me. 207.

² *Cotton v Phillips*, 56 N. H. 220.

³ *State v Hoyt*, 2 Oreg. 246.

⁴ *State v Goff*, 15 R. I. 505.

⁵ *State v Buttz*, 9 S. C. 156.

⁶ *State v Brinkerhoff*, 66 Tex. 45.

⁷ *Amory v Justices, etc.*, 2 Va. Cas. 523.

⁸ *State v Clendenin*, 24 Ark. 78.

⁹ *State v Feibleman*, 28 Ark. 424.
See also *Kenney v Goergen*, 36 Minn. 190.

¹⁰ *Lewis v Wall*, 70 Ga. 646.

¹¹ *Mohan v Jackson*, 52 Ind. 599.

¹² *Bryan v Cattell*, 15 Iowa, 538, at p. 550.

¹³ *Answer of the Justices*, 68 Maine 594.

¹⁴ *Comm. v Kirby*, 2 Cush. (Mass.) 577.

¹⁵ *State v Moore*, 48 Mo. 242.

¹⁶ *Howland v Luce*, 16 Johns. (N. Y.) 135.

¹⁷ *People v Green*, 58 N. Y. 295, rev'g 5
Daly, (N. Y.) 254; 46 How. Pr. (N. Y.)
169;

People v Murray, 73 N. Y. 535, rev'g 8
Daly, (N. Y.) 347.

¹⁸ *Goettman v Mayor, etc.*, 6 Hun (N. Y.)
132.

¹⁹ *Comm. v Binns*, 17 Serg. & R. (Pa.) 219.

²⁰ *In re District Attorney*, 11 Phil'a (Pa.)
645.

hold the offices of crier and messenger of the United States circuit or district court, and receive the salaries of both offices.¹ And an officer on the retired list of the United States army may hold an office in an executive department of the United States, and receive the salary in addition to his pay.²

§ 38. **Rulings upon constitutional and statutory inhibitions.**—The cases decided under constitutional or statutory provisions that a person shall not hold more than one office, or that an officer under the state government shall not hold any office under the United States government, chiefly turn upon the question whether a particular charge or agency is an “office,” or “a public trust,” where the latter expression is also used in the prohibitory provision. Many of the authorities cited in the first chapter are of that character.³ In the absence of any express or implied limitation in the constitution, the legislature has power to enact such a prohibitory provision.⁴ It has been held that a provision prohibiting the “appointment” of the same person to two or more offices, does not forbid his holding them, where one or both were conferred by popular election.⁵ Where the constitution forbids one person from holding two or more offices of trust at the same time, the legislature cannot constitutionally enact, that the clerks of one class of courts shall be *ex officiis* clerks of courts of another grade; describing the clerkship as *ex officio* does not make it less an office of trust.⁶ It has been held that the provision of the con-

¹ Preston v United States, 37 Fed. R. (U. S.) 417.

² Collins v United States, 15 Ct. of Cl. (U. S.) 22.

See also People v Duane, 121 N. Y. 367, cited *post*, § 39.

³ See *ante*, ch. 1.

⁴ People v Clute, 12 Abb. N. S. (N. Y.) 400. Where the constitution provides that the general assembly may declare

what offices are incompatible, a prohibition in the same constitution to hold another office takes effect whatever legislature declares. De Turk v Comm., 129 Pa. St. 151.

⁵ State v McCollister, 11 Ohio 46.

⁶ Bouanchaud v D'Herbert, 21 La. Ann. 138. See, however, State v Sommer, 33 La. Ann. 237.

stitution of Texas, to the effect that no person shall hold "more than one civil office of emolument, except that of justice of the peace" and others enumerated, means that a man may simultaneously hold either of the offices enumerated, and any other office.¹ Under a provision of a state constitution, rendering a judicial officer ineligible to a political office, the term of which begins before the expiration of his judicial term, where the term of a justice of the peace expired at midnight of the 16th of the month, it was held that he was ineligible to the office of township trustee at an election held on the 6th, where the term of that office began at the expiration of ten days from the election.² The provision of the constitution of Maine, prohibiting justices of courts from holding legislative offices, does not apply to "a trial justice, or justice of the peace and quorum."³ Where a judge is sitting temporarily for a judge of another court, that is not holding two offices, within a constitutional or statutory prohibition.⁴

§ 39. **The same subject as to state and federal offices.**—A provision in a state constitution, that one holding an office under the United States or any other power shall not be "eligible" to a state office, excludes one so holding at the time of the election, and a subsequent resignation of the former office will not suffice.⁵ But one who, at the time of election, was acting as inspector of United States customs under an appointment from the collector of the port, which had not been legalized by the approval of the secretary of the treasury, is

¹ *Gaal v Townsend*, 77 Tex. 464.

² *Vogel v State*, 107 Ind. 374.

³ *Answer of the Justices*, 68 Me. 594.

⁴ *Dukes v State*, 11 Ind. 557.

⁵ *Searcy v Grow*, 15 Cal. 117;

State v Clarke, 3 Nev. 566.

See also *People v Clute*, 50 N. Y. 451.

Contra, *semble*, *De Turk v Comm.*, 129 Pa. St. 151, holding that a resignation of the federal office, before answer in quo warranto, prevents judgment of ouster.

not excluded by this provision.¹ Aliter, if the appointment has been so approved.² Where the constitution of a state provides that no person holding office under the United States "shall hold or exercise any office" under the state, if a postmaster is elected a justice of the peace, the state courts, inasmuch as they have no power to declare the office of postmaster vacant, will declare the office of justice of the peace to be vacant, and the person liable in trespass for attempting to exercise it.³ If the office under the United States is accepted after the office under the state, the acceptance vacates the latter, within the rule stated, in the foregoing sections of this chapter.⁴ But one, holding office under the United States, cannot be declared by a state court to have forfeited his office by the acceptance of a state office.⁵ An officer on the retired list of the United States army is not within a statutory provision that certain municipal officers shall not hold any other federal, state, or municipal office.⁶

§ 40. **The same subject.**—It has been held that the prohibition against holding, by a state officer, another office under the authority of the United States, does not extend to a case where the state officer is a pension agent of the United States within the state, on the ground that "he is not required to take an oath of office, or to perform any other services, than such as may be confided to him by the war department, of which he is, merely for this special business, an agent."⁷ Where a city charter provided that the acceptance, holding, or retention of an

¹ *People v Turner*, 20 Cal. 142.

² *Crawford v Dunbar*, 52 Cal. 36.

³ *Rodman v Harcourt*, 4 B. Mon. (Ky.) 224.
See also *Justices v Harcourt*, 4 B. Mon. (Ky.) 499.

⁴ *Dickson v People*, 17 Ill. 191.

⁵ *De Turk v Comm.*, 129 Pa. St. 151.

⁶ *People v Duane*, 121 N. Y. 367, aff'g 55 Hun (N. Y.) 815.

See also *Collins v United States*, 15 Ct. of Cl. (U. S.) 22, cited *ante*, § 27.

But the contrary was held in *State v DeGress*, 55 Tex. 387.

⁷ *Lindsey v Att'y Gen'l*, 33 Miss. 508, per Fisher, J., p. 529.

See also *ante*, ch. 1.

office under the United States government, with the exception of that of commissioner to take bail, by the incumbent of a city office, should vacate the latter office, it was held that a city office, held by a circuit court commissioner, was vacated by his selection as chief supervisor of elections, under the act of congress of 1871, and his acceptance of such selection, although the act of congress required the chief supervisor to be selected by the court from the commissioners, and continued the person so selected in his office as such commissioner.¹

¹ *Davenport v Mayor, etc.*, 67 N. Y. 456.

CHAPTER V

ASSIGNMENT OF AN OFFICE, OR OF THE EMOLUMENTS
THEREOF

CONTENTS

- SEC. 41. English rule that certain offices are assignable; such rule does not exist here.
42. English cases, holding that an assignment of future emoluments of an office is void; reason for the rule.
43. American cases to the same effect.
44. Certain cases holding the other way; and apparent exceptions to the rule.
45. Salary or fees already earned may be lawfully assigned; so if payable on a contingency.
46. English ruling as to the validity of the assignment of a pension.
47. American rulings on the same subject.
48. Rulings that unearned emoluments cannot be reached by attachment, garnishee process, etc.

§ 41. English rule that certain offices are assignable.—As we have shown in a former chapter,¹ many offices in England are regarded as property, and as capable of being inherited. Such offices may be assigned by the holder thereof, but by deed only, because an office is a thing which lies in grant.² But where the office is one of trust, it cannot be assigned without the consent of the person who granted it.³ The rule extends to offices granted by the crown. Thus it was held that the office of warden of a forest, or woodward, or forester of the crown, being an office of trust, cannot be assigned without a license from the crown; that such a license must

¹ *Ante*, ch. 2.

³ *Id.* See also *Com. Dig.*, tit. *Officer*, C a.

² *Bac. Abr.* tit. *Offices and Officers*, E.

be founded on a return to a writ of *ad quod damnum*; and that this is the rule, although the office was granted to A, his heirs and assigns.¹ It goes without saying, that questions of this kind can never arise in the United States, in which there are no inheritable or assignable offices.²

§ 42. **English rule that assignment of future emoluments is void.**—The English cases hold uniformly that an assignment of the emoluments of a public office, thereafter to accrue, is void, whether such emoluments consist of a salary, or fees, or other official profits; and the application of the rule is not affected by the fact that the assignor has power to appoint a deputy to perform his official duties, and that the assignment provides for the compensation of such a deputy. Thus it was held, that an assignment by deed to trustees, of all the income, emoluments, and profits, which, during the life of the assignor, and his continuing to hold the office of clerk of the peace for Westminster, should arise, etc., after deducting the salary or allowance of his deputy, in trust to pay certain debts, etc., was not valid in law. Dallas, Lord Ch. J., said: "What is the nature of the office of clerk of the peace in the eye of the law? He is to receive a salary commensurate with his duty. If his deputy becomes ill, the principal must perform the duties of the office himself; but how can he do so, if there be nothing to sustain him? So if the deputy were to die, how could the duties of the office be performed?"³ And in another case, it was held that the profits of an ecclesiastical benefice did not pass to the assignees under an insolvent act, although included in the schedule of the insolvent, the

¹ *Att'y Gen. v Matthias*, 4 Kay & J. 579; 27 L. J., Ch. 761; 4 Jur., N. S., 628.

² See *Ellis v State*, 4 Ind. 1.

³ *Palmer v Bate*, 6 Moore, 28; 2 Brod. & Bing. 673.

See also *Barwick v Reade*, 1 H. Blackst. 627;

Flarty v Odium, 8 T. R. (D. & E.) 681; *Davis v Marlborough* (Duke of), 1 Swanst. 74, per Lord Eldon, p. 79.

court saying, "Unquestionably any salary paid for the performance of a public duty ought not to be perverted to other uses, than those for which it is intended.¹ This rule rests upon the ground of public policy, which forbids any thing tending to weaken the efficiency of the public service, inasmuch as an officer, who thus anticipates his compensation, has less inducement to faithfulness in the discharge of his duties; and also because the law presumes that the officer requires the payment of the emoluments of his office, to enable him to uphold its dignity, and properly to perform its duties."²

§ 43. **American cases to same effect.**—In a leading American case upon this subject, the complaint alleged that the defendant was a clerk in the United States treasury department in New York city, and that he sold and assigned to the plaintiff a month's salary in advance, at a discount of ten per centum; and that the defendant, when the salary became due, collected the same and converted it to his own use. A judgment dismissing the complaint was affirmed upon appeal. Johnson, J., delivering the opinion of the court, cited and discussed all the English and American cases decided upon this question to the time of rendering the decision; and thereupon said: "The public service is protected by protecting those engaged in performing public duties; and this, not upon the ground of their private interest, but upon that of the necessity of securing the efficiency of the public service, by seeing to it, that the funds provided for its maintenance should be received by those who are to perform the

¹ *Arbuckle v Cowtan*, 3 Bos. & P. 321, per Lord Alvanley, Ch. J., p. 323.

² *Id.* See, also *Palmer v Vaughan*, 3 Swanst. 173;

Liverpool v Wright, 1 Johns. Ch. 359; 23 L. J., Ch. 868; 5 Jur. N. S. 1156; cited *post*, § 52;

Hill v Paul, 8 Clark & Finn. Parl. R. 295;

Hunter v Gardner, 5 Wilson & Shaw, 616, per Lord Brougham, Ch'r;

Aston v Gwinell, 3 Younge & J., 136, per Alexander, Ch. B. pp. 148, 149;

Cooper v Reilly, 2 Sim. 560;

Lidderdale v Montrose, 4 T. R. (D. & E.) 248;

Wells v Foster, 8 M. & W. 149.

work, at such periods as the law has appointed for their payment.”¹ The opinion refers to the only American case in which a contrary decision had been made,² wherein the assignment of an officer’s salary in advance was upheld, and the doctrine of the English cases was declared to be not applicable “to the condition of society or to the principles of law or of public policy in this country.” With respect to that case the learned judge said: “We do not understand that the English decisions really rest on any grounds peculiar to that country, although sometimes expressed in terms which we might not select to express our views of the true foundation of the doctrine in question. The substance of it all is, the necessity of maintaining the efficiency of the public service, by seeing to it that public salaries really go to those who perform the public service. To this extent, we think, the public policy of every country must go, to secure the end in view.”³ In a very recent case in the same court, it was held that fees thereafter to be received by an officer cannot be assigned.⁴ Rulings in other states, establishing the same doctrine, are cited in the note.⁵

§ 44. **Certain cases to contrary; and apparent exceptions.**—In some cases in Massachusetts, assignments of officers’ salaries in advance have been sustained, without considering the question of public policy.⁶ But

¹ *Bliss v Lawrence*, 58 N. Y. 442, per Johnson J., p. 445.

² *State v Hastings*, 15 Wis. 75.

³ *Bliss v Lawrence*, 58 N. Y. 442, per Johnson, J., pp. 450, 451.

See also *Billings v O'Brien*, 14 Abb. Pr. N. S. (N. Y.) 238; 45 How. Pr. (N. Y.) 392.

⁴ *Bowery Nat'l Bk. v Wilson*, 122 N. Y. 478, overruling *People v Dayton*, 50 How. Pr. (N. Y.) 143, wherein it was said that the rule did not extend to

fees; s. c. 3 Weekly Dig. (N. Y.) 341.

⁵ *Webb v McCauley*, 4 Bush (Ky.) 10; *Field v Chipley*, 79 Ky. 260; *Beal v McVicker*, 8 Mo. App. 202. See also *Schloss v Hewlett*, 81 Ala. 266; *Bangs v Dunn*, 66 Cal. 72.

⁶ *Brackett v Blake*, 7 Met. (Mass.) 335; *Mulhall v Quinn*, 1 Gray (Mass.) 105; *Macomber v Doane*, 2 Allen (Mass.) 541. See also *Adams v Tyler*, 121 Mass. 380; *Walker v Cook*, 129 Mass. 577; *Dewey v Garvey*, 130 Mass. 86.

the preponderance of the American authorities is in support of the rule laid down in the cases in England, and the case in New York, cited in the last preceding section.¹ However, where an officer entered into a partnership agreement, one clause of which provided that the salaries, etc., received by either of the partners from any office or employment should be the property of the firm, it was held, that it was valid, as respects the salary of the defendant as a public officer. The court said: "The case in hand is not that of an assignment of an unearned salary, where all control over the expected funds, even to their reception in the first instance, is passed over to another. It is but an agreement as to the manner in which the salary shall be employed or disposed of, when earned and paid. . . . The agreement did not take away from the parties the right to receive their salaries, at such periods as the law appointed for their payments. Its effect was not to impair their obligations as public officers, or to present inducements to inefficiency or unfaithfulness in the performance of their public duties."²

§ 45. **Salary or fees already earned may be assigned.**—So there is no legal objection to the assignment by an officer of salary or fees already earned, as the grounds of objection to an assignment of prospective emoluments do not apply.³ And it was held that a sum payable to the representative of an Indian judge, upon the contingency of his death within six months after his arrival in India, might be assigned by him, for the same reason.⁴

¹ *Bangs v Dunn*, 66 Cal. 72;
Beal v McVicker, 8 Mo. App. 202;
 2 Story's Eq. Jur. (12th Ed.) § 1040 e;
 1 Story Contr. (5th Ed.) § 709.
 See also *post*, § 48.

² *Thurston v Fairman*, 9 Hun (N. Y.) 584.
Accord, *Sterry v Clifton*, 9 C. B. 110; 19
 L. J. C. P., 237; 14 Jur. 312.

³ *Bliss v Lawrence*, 58 N. Y. 442, per Johnson, J., p. 446;
Birkbeck v Stafford, 14 Abb. Pr. (N. Y.) 285; 23 How. Pr. (N. Y.) 236;
Platt v Stout, 14 Abb. Pr. (N. Y.) 178;
Stephenson v Walden, 24 Iowa, 84.
⁴ *Arbuthnot v Norton*, 5 Moore P. C. Cas. 219.

§ 46. **English rulings as to assignment of a pension.**—With respect to a pension, the opinions in the cases hereinafore cited indicate the rule to be, that where it is given as a compensation for past services, it is assignable; but where it is wholly or partly a compensation for future services, absolutely or contingently to be performed, it is not assignable. The half pay of a retired officer of the army is regarded in England as belonging to the latter class, inasmuch as the crown may at any time require his services; and so the authorities agree that such half pay is not assignable.¹ And in one case it was held that a pension to a retired civil officer was not assignable.² But in another case it was held that although an officer's pay is not assignable at law, yet the use of it may be assigned in equity, and when so assigned, the assignor cannot maintain at law, the action for money had and received, which is of an equitable nature.³ But in this case, the question of public policy, although suggested by counsel, was not noticed by the court, and, on that ground, the case is regarded as overruled.⁴ The rule that emoluments are not assignable is confined to those proceeding from a public office; and so it was held that there was no valid objection to the assignment of the profits, to be received by a clerk to the deputy register of the prerogative court of Canterbury, on the ground that he was not an officer, but a mere clerk.⁵

§ 47. **American rulings as to assignment of a pension.**—In the United States,⁶ in the absence of legislation on the subject, the authorities have followed the English rule

¹ *Flarty v Odium*, 3 T. R. (D. & E.) 681;
Lidderdale v Montrose (Duke of) 4 T. R.
 (D. & E.) 248;
Stone v Lidderdale, 2 Anst. 533;
Wells v Foster, 8 Meeson & W. 149;
Aston v Gwinell, 3 Younge & J. 136, per
 Alexander, Ch. B., pp. 148, 149.

² *Wells v Foster*, 8 M. & W. 149.

³ *Stuart v Tucker*, 2 W. Bl. 1137.

⁴ *Stone v Lidderdale*, 2 Anst. 533, per
 Macdonald, Ch. B., at p. 541.

⁵ *Aston v Gwinell*, 3 Younge & J. 136.

⁶ 2 Story Eq. Jur. (12th Ed.) §§ 1040 *e* to
 1040 *g*;

Jenkins v Hooker, 19 Barb. (N. Y.) 435.

as to the non-assignability of military and naval pensions. But now the acts of congress regulate all questions relating to the payment of such pensions, and even the compensation of the attorneys or agents to procure them. And in the very few cases, where pensions are allowed in this country to retired civil officers, no question, respecting the assignability thereof, has arisen in any adjudication, as far as the author has been able to discover.

§ 48. **Unearned emoluments cannot be reached by attachment, etc.**—The foregoing rules as to the assignability of an officer's compensation involve also the conclusion that it cannot be reached, before it is payable, by attachment, garnishment, or other legal proceeding. As additional reasons for the same conclusion, it has been said in some cases, that public policy requires that the disbursing officers, intrusted with payments out of the public revenue, should not be embarrassed in the discharge of their duties by such litigations, and also that the efficiency of the public service should not be hazarded by any uncertainty respecting the payment of the officers charged with performance thereof.¹

¹ *Boone County v Keck*, 31 Ark. 387;
Com'rs v Bond, 3 Colo. 411;
Ward v Hartford, 12 Conn. 404;
Hightower v Slaton, 54 Ga. 108;
Merwin v Chicago, 45 Ill. 133;
Wallace v Lawyer, 54 Ind. 501;
Jenks v Osceola Township, 45 Iowa, 554;
Tracy v Hornbuckle, 8 Bush (Ky.) 336;
Baltimore v Root, 8 Md. 95;
School Dist. v Gage, 39 Mich. 484;

McDougal v Hennepin County, 4 Minn. 184;
Hawthorn v St. Louis, 11 Mo. 59;
Erie v Knapp, 29 Pa. St. 173;
Buchanan v Alexander, 4 How. (U. S. 20);
Bradley v Richmond, 6 Vt. 121;
Merrell v Campbell, 49 Wis. 535.
The cases in Massachusetts, cited in § 44, note 1, *ante*, arose upon process of garnishment.

CHAPTER VI

TRAFFICKING IN OFFICES; AND OTHER CONTRACTS RESPECT-
ING OFFICES, OFFICERS, OR OFFICIAL CONDUCT

CONTENTS

- SEC. 49. English statutes against trafficking in offices ; the offence is punishable at common law.
50. All contracts for procuring an office through the promisee's influence with a third person, or otherwise influencing an appointment, are void under the statutes and at common law ; and equity will also annul them.
51. The same rule applied to offices of the East India Company, as a branch of the government.
52. Corruption or guilty intent not essential ; case where the borough of Liverpool appointed an officer under a contract, which was avoided in equity ; other English cases ; rule as to sale of military commissions.
53. English statutes have been re-enacted in this country, and our courts follow the English rulings thereupon ; instances and authorities.
54. Contract void where one of two applicants for appointment withdraws on a contract to divide fees ; so where candidate for election agrees to pay for efforts to elect him ; and other similar cases.
55. So where members of appointing board contract *inter sese* as to their votes ; so as to contracts relating to resigning or exchanging offices ; American cases on the general doctrine.
56. All "lobby contracts," so called, are void ; what contracts for services before congress or a state legislature are within this rule, and what contracts are valid.
57. The same subject.
58. Certain cases, where contracts relating to private legislation only were sustained.
59. Contracts to procure particular official action, from an executive or administrative officer, such as a pardon, a public improvement, etc., when valid and when void.

- SEC. 60. The same subject; contracts to furnish supplies, etc., for public use.
61. The same subject; contract for supplies, etc.
 62. The same; also contract for discharge of men drafted for the army; contract for sale to government.
 63. Contracts between persons bidding or intending to bid upon proposals to furnish articles, etc., for public use; when void.
 64. The same subject; cases where such agreements are valid.
 65. Contracts to induce an officer to violate his duty, unlawful.
 66. Contracts where a reward to the officer is stipulated equivalent to corruption; otherwise, *semble*, where reward enures to public benefit.

§ 49. **English statutes against trafficking; the common law.**—The first English statute, with respect to trafficking in offices, 12 Richard II, ch. 2, forbade the granting of offices “for any gift, favour, or affection;”¹ and this statute was followed by others against the same offence and other similar offences, the principal of which were 5 and 6 Edward VI, ch. 16, and 49 Geo. III, ch. 126.² But “the taking or giving of a reward for offices of a public nature is said to be bribery; it is said to be *malum in se*, and indictable at common law.”³ And the sale of a public office, or of a deputation to a public office, although not within the enactments, is void at common law.⁴

§ 50. **Contracts to procure an office void; equity will annul them.**—Not only is actual corruption, that is, the receipt by and the giving to, the appointing power, of a reward for making the appointment, punishable at common law and under the statutes; but all contracts for a

¹ Com. Dig., tit. Officer, A 2.

² For the substance of each of those statutes, see Chitty on Contr., 9th English ed.; 11th American ed., pp. 1013, 1014; and Bac. Abr., tit. Offices and Officers, F.

³ Bac. Abr., tit. Offices and Officers, F.

Rex v Vaughan, 4 Burr. 2494;

Rex v Pollman, 2 Campb. 329.

See also Comm. v Callagan, 2 Va. Cas. 460, cited *post*, § 55.

⁴ Chitty on Contr., 9th English ed.; 11th American ed., 990, 1016.

Hanington v DuChatel, 1 Bro. Ch. R. 124.

reward for procuring an appointment by the influence of a third person, or for the appointment of a deputy by the principal, or otherwise for influencing such an appointment or deputation, are void at law and in equity; and that without reference to the question of actual corruption or other guilty intent. "Contracts for the buying, selling, or procuring of public offices . . . are justly deemed contracts of moral turpitude, and are calculated to betray the public interests into the administration of the weak, the profligate, the selfish, and the cunning. They are therefore held utterly void, as contrary to the soundest public policy, and indeed as a constructive fraud upon the government." ¹ "There is no rule better established, respecting the disposition of any office in which the public are concerned, than this, *detur digniori*: on principles of public policy, no money consideration ought to influence the appointment to such offices. . . . Up to a certain point the legislature have interfered, and prohibited by the statute, 5 and 6 Edw. VI, the sale of some offices; but whether or not that act of parliament were necessary for the purpose, I will now inquire." ² These remarks were made in 1799, before the enactment of the statute, 49 Geo. III. As the statute of 5 and 6 Edw. VI did not extend to all the mischiefs which arose in this connection, the aid not only of the courts of common law, but also of equity, was successfully invoked to reach abuses which the statute did not cover; for although the statute was penal in its general scope, yet its object was to prevent a public mischief, in which equity will aid. ³ Thus the court of chancery decreed the repayment of a

¹ 1 Story Eq. Juris. 12th ed. § 295;

1 Story Contr. 5th ed. § 709.

² *Blachford v Preston*, 8 T. R. 89, per Lord Kenyon, Ch. J. *Accord*, *Eddy v Capron*, 4 R. I. 394, per Ames, Ch. J. See also *Parsons v Thompson*, 1 H. Blackst. 322;

Hopkins v Prescott, 4 C. B. 578;

Outon v Rodes, 3 A. K. Marsh. (Ky.) 433;

Groton v Waldo, 11 Me. 306;

Meredith v Ladd, 2 N. H. 517;

Carleton v Whicher, 5 N. H. 196.

³ *Bac. Abr. tit. Offices and Officers*, F.

sum paid for the influence of a person with the appointing power, to procure for the plaintiff an office, from which he was afterwards discharged. The lord chancellor said: "I have not the least doubt on this case; and if there is no precedent of such a determination as I shall make, I have no scruples to make one, and shall glory in doing it. . . . If a man sells his interest to procure a person an office of trust or service under the government, it is a contract of turpitude; it is acting against the constitution, by which the government ought to be served by fit and able persons, recommended by the proper officers of the crown for their abilities, and with purity. The case is within the reason of the determinations upon marriage brocage and post obit bonds. It is one of the most useful jurisdictions of the court, and ought to be exercised on all occasions." ¹

§ 51. **Rule applied to East India Company.**—The doctrine has been applied to contracts which related to appointments by the East India Company. Thus, where an action was brought on an agreement, to the effect that the defendant, in consideration of £5,000, paid for the command of a ship in the East India Company's service, promised to repay the amount, in case another was appointed to the command, it appearing that the plaintiff's testator was appointed upon the recommendation of the defendant, who was ship's husband or managing owner, and that he was afterwards discharged, a rule *nisi* for a nonsuit was made absolute. Lord Kenyon, Ch. J., after the remarks quoted in the last section, continued: "The East India Company is a limb of the government of the country; and on the ground that this contract was

¹ *Morris v McCulloch*, Ambl. 432: 2 Eden, 190. See also *Law v Law*, Cas. temp. Talbot, 140; s. c. 3 P. Wms. 391; *Hanington v DuChatel*, 1 Bro. Ch. R.

Lee v Colehill, Cro. Eliz. 529; *Rex v Vaughan*, 4 Burr. 2494; *Purdy v Stacey*, 5 Burr. 2698; *Rex v Pollman*, 2 Campb. 220.

a fraud on the East India Company, from which much mischief to the public may ensue, I am of opinion that it cannot be made the basis of an action.”¹ But in another case, where the facts were very similar, except that it appeared that the whole transaction was with the knowledge and consent of the East India Company, it was held that this circumstance purged the contract from illegality.²

§ 52. **Corruption or guilty intent not essential.**—The principle, that the absence of actual corruption or other guilty intent does not validate a contract of this character, was forcibly stated and applied by Vice Chancellor Sir W. Page Wood, in a suit in equity for an accounting brought by the appointing power, the corporation of Liverpool, upon an agreement with the defendant, whereby, upon his appointment to the office of clerk of the peace, he agreed to accept a fixed salary in lieu of his fees, and that any surplus of fees above the salary should be paid into the borough fund. The defendant demurred to the bill, and his demurrer was allowed. The vice-chancellor said: “There are two clear grounds of public policy, which render such an agreement illegal. The first is this. There is a series of statutes—agreeing in principle to a great extent with the common law, but supporting its prohibitions by the addition of penalties—which say that an office of trust is a subject for which no bargain at all shall be made. . . . Every person, who is appointed to any office of this kind, is forbidden to make, and the persons who make the appointment are forbidden to receive, any payment in respect of the appointment. When such bargains are termed corrupt, the word is not aimed at a distinction between the obtaining of public and private benefits; but within the meaning of these statutes,

¹ *Blachford v Preston*, 8 T. R. (D. & E.) 89.

Accord, Card v Hope, 2 Barn. & Cr. 661.

² *Richardson v Mellish*, 2 Bing. 220.

every illegal payment for an appointment must be considered corrupt, whatever may be the purpose to which the money is applied. Thus if trustees of a charity, having the right to appoint a steward of a manor, do so in consideration of a sum to be paid by the officer for the benefit of the charity, that would be within the prohibition of the statutes. . . . In the second place, quite independently of any corrupt bargain, a person appointed to an office of this description, is disabled, on grounds of public policy, from dealing with his fees, because he is considered to require them to enable him to uphold the dignity and perform the duties of his office. Public policy prohibits any alienation or incumbrance of such fees.”¹ Other cases in the English courts establish the same general principle.² The practice, which formerly prevailed, of selling military commissions, is recognized, not as an exception to the rule, but as lacking the foundation of principle upon which the rule rests. For such sales were made by the license of the crown, and the person to succeed was examined by or under the direction of the secretary at war, and approved as a proper person.³

§ 53. English statutes and rule followed.—The American authorities follow closely the rule laid down in the English cases, applying it to statutes similar to those of

¹ *Liverpool (Corporation of) v Wright*, 1 Johns. Ch. 359; 28 L. J. Ch. 868; 5 Jur. N. S. 1156.

Followed in *Dublin (Mayor of) v Hayes*, 10 Irish R., C. L., 226.

See this case and American cases *in pari materia*, cited *post*, §§ 452, 453.

² *Greville v Atkins*, 9 Barn. & Cressw. 462; *Clarke v Harvey*, 1 Stark. 92; *Græme v Wroughton*, 11 Exch. 146; 24 L. J., Exch. 265;

Reg. v Charretie, 13 Q. B. 447; 13 Jur. 450; *Parsons v Thompson*, 1 H. Blackst. 322; *Methwold v Walbank*, 2 Ves. 238;

Hartwell v Hartwell, 4 Ves. Jr. 811

Stackpole v Earle, 2 Wils. 133;

Waldo v Martin, 6 D. & R. 364; 2 C. & P. 1; 4 Barn. & Cressw. 319;

Hopkins v Prescott, 4 C. B. 578;

Garforth v Fearon, 1 H. Blackst. 327;

Hughes v Statham, 6 D. & R. 219, 4 B. & C. 187;

Bellamy v Burrow, Cas. temp. Talbot, 97;

Money v MacLeod, 2 Sim. & St., 301.

³ *Morris v McCulloch*, Ambler, 432, per Lord Henley, Ch'r; s. c. 2 Eden, 190; *Hartwell v Hartwell*, 4 Ves. Jr. 811 at p. 815.

Joe v Ash, Prec. in Ch. 99.

5 and 6 Edw. IV and 49 Geo. III, which are in force in all the states of the Union, and supplying the cases omitted in the statutes, by resort to the common law and the general principles of equity. From the nature of our institutions, the cases, in which the question of illegality arises, present a great variety of circumstances.¹ Some cases, where candidates have secured offices at popular elections, by promises to individuals or to the body of electors, which presented the question whether the election law of the state was so violated, that the candidate was rendered ineligible, are collected in the next succeeding chapter; and others, wherein an officer contracted to accept less than his lawful compensation, will be considered in connection with the other rules relating to an officer's compensation.² Some cases, presenting peculiar features, which recognize and apply the general principle, that contracts to procure offices are void, whether the office is to be bestowed by appointment or by popular election, will now be cited.

§ 54. **Certain contracts held void.**—Thus it was held in New York, that where two persons are applicants for appointment to an office by the governor, and one withdraws, upon an agreement between them to divide the fees of the office, if the other shall be appointed, and to aid the latter in procuring the appointment, the agreement is void; and, the appointment having been thus procured, an action will not lie upon the agreement, although it was under seal: and the general rule was declared to be that all agreements by which one engages to pay another for his aid or influence in procuring an office, are void at

¹ In some of the New England states, certain town offices may lawfully be sold at auction by the town.

Thetford v Hubbard, 22 Vt. 440;

Alvord v Collin, 20 Pick. (Mass.) 418.

It has been held, in Massachusetts, that a vote of the town to let out

the collection of the taxes to the lowest bidder whom the town will accept, is valid; but the sale of the right to the lowest bidder, without regard to his qualifications, is not. Howard v Proctor, 7 Gray (Mass.) 128.

² Post, §§ 452, 453.

common law; so that an action would not lie upon the agreement in question, or any new agreement made to carry out its unexecuted provisions, although it was not within the statute relating to the sale, etc., of offices.¹ It was also held, in the same state, that an agreement by a candidate for an elective office to pay money to the executive committee of a political organization, to be used for expenses in efforts to promote the candidate's election, incurred for purposes other than those for which the statute expressly allows money to be expended, was void, not only under the statute, but also upon grounds of public policy.² And in another state, it was held that a contract to pay the promisee for his services as a canvasser at a primary election to procure the promisor's nomination to an elective office, was void.³ And, generally, all contracts to vote for, or otherwise support a person, for election, appointment or nomination to a public office are void.⁴

§ 55. **Certain other contracts held void.**—So an agreement between A and B, two justices of the peace, and members of a court empowered to appoint to certain offices,

¹ *Gray v Hook*, 4 N. Y. 449, rev'g s. c. 6 Barb. (N. Y.) 338.

S. P., applied to a contract between candidates at an election by the people, *Robinson v Kalbfleisch*, 5 N. Y. Sup. Ct. (T. & C.) 212;

Glover v Taylor, 38 La. Ann. 634;

Gaston v Drake, 14 Neva. 175;

Hunter v Nolf, 71 Pa. St. 282;

See also *Martin v Wade*, 37 Cal. 168;

Haas v Fenlon, 8 Kan. 601;

Meguire v Corwine, 101 U. S. 108; s. c.

3 MacArthur (D. C.) 81.

² *Foley v Speir*, 100 N. Y. 552, aff'g 11 Daly, (N. Y.) 254.

S. P., *Martin v Wade*, 37 Cal. 163.

³ *Keating v Hyde*, 23 Mo. App. 555.

In one case it was held that a contract

to compensate the promisee, for speaking in public in another state, in support of the promisor's candidacy for an office, was not a violation of public policy, or of the New York election law. *Murphy v English*, 64 How. Pr. (N. Y.) 362.

⁴ *Liness v Hessing*, 44 Ill. 113;

Stout v Ennis, 28 Kan. 706;

Swayze v Hull, 8 N. J. L. 54;

Ham v Smith, 87 Pa. St. 63;

Nicholls v Mudgett, 32 Vt. 546.

See also *Robertson v Robinson*, 65 Ala. 610;

Groton v Waldoborough, 11 Me. 306;

Salling v McKinney, 1 Leigh (Va.) 42.

that A shall vote for C to fill one of such offices, in consideration that B shall vote for D to fill another, and the actual voting by them, pursuant to such agreement, do not constitute an offence under the statute against buying and selling offices, but constitute a misdemeanor at common law.¹ So an agreement to resign an office held by the promisor, and to use his influence for the appointment of a particular person in his place, is void.² So is an agreement to pay money to a person, in consideration of an exchange of offices between him and the promisor.³ Other American cases, illustrating and applying the general rule, that contracts of this description are void, are contained in the note.⁴ The exception, if so it may properly be styled, where an officer takes a contract from his deputy to share the emoluments of the latter's office, will be considered, together with other rules relating to contracts between an officer and his deputy, in a subsequent chapter.⁵

§ 56. **Lobby contracts.**—Another class of contracts, which are deemed invalid as contrary to public policy, consists of those known as “lobby contracts,” being contracts for services in “lobbying” to procure the passage

¹ *Comm. v Callaghan*, 2 Va. Cas. 460.

² *Meacham v Dow*, 32 Vt. 721.

Accord, under statutes of Edward VI and Geo. III, *Hopkins v Prescott*, 4 C. B. 578.

See also *Hutton v Lewis*, 5 T. R. (D. & E.) 639;

Forbes v McDonald, 54 Cal. 98.

³ *Stroud v Smith*, 4 Houst. (Del.) 448.

⁴ *Robertson v Robinson*, 65 Ala. 610;

Martin v Wade, 37 Cal. 168;

Liness v Hessing, 44 Ill. 113;

Co. Com'rs v Mulliken, 7 Blackf. (Ind.) 301;

State v Johnson, 52 Ind. 197;

Haas v Fenlon, 8 Kan. 601;

Outon v Rodes, 3 A. K. Marsh. (Ky.) 432;

Faurie v Morin's Syndics, 4 Martin (La.) 39;

Groton v Waldoborough, 11 Me. 306;

Gaston v Drake, 14 Neva. 175;

Meredith v Ladd, 2 N. H. 517;

Carleton v Whicher, 5 N. H. 196;

Hager v Catlin, 18 Hun (N. Y.) 448;

Filson v Himes, 5 Pa. St. 452;

Eddy v Capron, 4 R. I. 394;

Tool Comp'y v Norris, 2 Wall (U. S.) 45;

Meguire v Corwine, 101 U. S. 108;

Oscanyon v Winchester Rep. Arms

Comp'y, 15 Blatchford C. C. (U. S.) 79, aff'd 108 U. S. 261.

⁵ *Post*, ch. 24.

of laws by the legislature. Obviously there is nothing objectionable in a contract by an attorney or counsel to render open and honorable professional services in supporting a measure pending in the legislature. And such contracts are recognized as lawful.¹ Thus it was held that a statute, making it a misdemeanor to pay compensation for securing the passage of any law, did not apply to an attorney's professional services.² Within certain limits, depending principally upon the open and public character of the services rendered, as distinguished from individual or secret solicitations, similar contracts are deemed to be valid, although the person rendering the services is not an attorney or counsellor at law.³ But where the contract contemplates efforts to procure the desired legislation, by personal influence upon, or private solicitations of, individual members of the legislature, or the like, and *a fortiori*, by corruption, it is unlawful, and neither party can maintain an action upon it. Thus a contract providing that a party should "give all the aid in his power, spend such reasonable time as may be necessary, and generally use his utmost influence and exertions" to procure the enactment of a particular bill pending in the legislature, was declared to be unlawful and void upon its face. The court said: "This contract is void as against public policy. It is a contract leading to secret, improper, and corrupt tampering with legislative action. It is not necessary to adjudge that the parties stipulated for corrupt action, or that they intended that secret and improper resorts should be had. It is enough

¹ Weed v Black, 2 MacArthur (D.C.) 268;
Russell v Burton, 66 Barb. (N. Y.) 539;
Bryan v Reynolds, 5 Wis. 200.

This general proposition is also recognized in most of the cases herein-after cited.

² Yates v Robertson, 80 Va. 475.

³ Brown v Brown, 34 Barb. (N. Y.) 533;

Lyon v Mitchell, 36 N. Y. 235, 682;
Hendrickson v Bender, 5 Week. Dig.
(N. Y.) 463;

Sedgwick v Stanton, 14 N. Y. 239;

Bryan v Reynolds, 5 Wis. 200.

See also Miles v Thorne, 38 Cal. 335;

Coquillard v Bearss, 21 Ind. 479;

Willey v Collier, 7 Md. 273.

that the contract leads directly to those results. It furnishes a temptation to the plaintiff, to resort to corrupt means or improper devices to influence legislative action. It tends to subject the legislature to influences destructive of its character, and fatal to public confidence in its action." ⁴ So the supreme court of the United States adjudged to be void a contract to take care of a claim before congress, and prosecute it, as attorney and agent for the claimants, where it appeared that part of the means, contemplated and actually adopted, consisted of the personal solicitation of members of congress by the agent, and others supposed to have influence with them, to induce them to pass an act providing for the payment of the claim. Swayne, J., delivering the opinion of the court, said: "We entertain no doubt that in such cases, as under all other circumstances, an agreement, express or implied, for purely professional services is valid. Within this category are included drafting the petition to set forth the claim, attending to the taking of testimony, collecting facts, preparing arguments, and submitting them, orally or in writing, to a committee or other proper authority, and other services of like character. All these are intended to reach only the reason of those sought to be influenced. They rest on the same principle of ethics, as professional services rendered in a court of justice, and are no more exceptionable. But such services are separated by a broad line of demarcation from personal solicitation, and the other means and appliances which the correspondence shows were resorted to in this case. There is no reason to suppose that they involved anything corrupt, or different from what is usually practiced by all paid lobbyists in the prosecution

⁴ *Mills v Mills*, 40 N. Y. 543, aff'g 36 Barb. (N. Y.) 474.

See also *Spence v Harvey*, 22 Cal. 337;

Gil v Williams, 12 La. Ann. 219;

Thomas v Caulkett, 57 Mich. 382;

Atcheson v Mallon, 43 N. Y. 147;

Powers v Skinner, 34 Vt. 274.

of their business.”¹ In the concluding portion of the opinion, the learned judge also remarked: “We have said that for professional services in this connection, a just compensation may be recovered. But where they are blended and confused with those which are forbidden, the whole is a unit and indivisible. That which is bad destroys that which is good, and they perish together. Services of the latter character, gratuitously rendered, are not unlawful. The absence of motive to wrong is the foundation of the sanction. The tendency to mischief, if not wanting, is greatly lessened. The taint lies in the stipulation for pay. Where that exists, it affects fatally, in all its parts, the entire body of the contract.”²

§ 57. **The same subject.**—In other cases, the courts within the United States have laid down with great uniformity the general rule, that such contracts are unlawful.³ And the remark, at the conclusion of the opinion in the case last cited, that where part of the services contracted for or rendered are of such a character that compensation therefor may lawfully be awarded, but they are blended and confused with those that are forbidden,

¹ *Trist v Child*, 21 Wall. (U. S.) 441.

² *Id.* p. 452.

³ *Weed v Black*, 2 MacArthur (D. C.) 268;
Elkhart Co. Lodge v Crary, 98 Ind. 238;
Kansas Pacific Ry. Comp'y v McCoy,
 8 Kan. 538;
McBratney v Chandler, 22 Kan. 692;
Wood v McCann, 6 Dana (Ky.) 366;
Gil v Davis, 12 La. Ann. 219;
Willey v Collier, 7 Md. 273;
Fuller v Dame, 18 Pick. (Mass.) 472;
Frost v Belmont, 6 Allen (Mass.) 152;
Reed v Peper Tobacco W. Comp'y, 2
 Mo. App. 82;
Harris v Roof, 10 Barb. (N. Y.) 489;
Rose v Truax, 21 Barb. (N. Y.) 361;
Brown v Brown, 34 Barb. (N. Y.) 533;

McKee v Cheney, 52 How. Pr. (N. Y.) 144;
Cary v West. Union Tel. Comp'y, 47
 Hun (N. Y.) 610; 20 Abb. N. C. (N. Y.)
 333;
Bank of Monroe v State, 26 Hun (N. Y.)
 581;
Sedgwick v Stanton, 14 N. Y. 239;
Lyon v Mitchell, 36 N. Y. 235, 682;
Harris v Simonson, 28 Hun (N. Y.) 318;
Sweeney v McLeod, 15 Oreg. 330;
Clippinger v Hepbaugh, 5 Watts & S.
 (Pa.) 315;
Usher v McBratney, 3 Dillon (U. S.) 385;
Marshall v Baltimore, etc., R. R.
Comp'y, 16 How. (U. S.) 314;
Oscanyon v Winchester, etc., Arms
Comp'y, 103 U. S. 261;
Pingey v Washburn, 1 Aik. (Vt.) 264;
Powers v Skinner, 34 Vt. 274;
Bryan v Reynolds, 5 Wis. 200.

the whole transaction is unlawful, and no compensation can be awarded for any of the services, is also sustained, not only by the general rules of law applicable to illegal contracts, but by decisions upon this particular class of contracts.¹ And if the agreement does not show, upon its face, that the services contemplated or rendered were of an unlawful character, that fact may be shown by parol or other extrinsic evidence.²

§ 58. **Certain contracts as to private legislation sustained.**—It has been held, however, that a contract between a railway company and a landowner, who is also a member of parliament, fixing the compensation to be paid to him for damages to his land, and providing that he shall support, or withdraw his opposition to, the company's bill is lawful, if there is no proof of a corrupt influence upon his vote.³ And it has been held that a contract to withdraw opposition to legislation of a purely private character is valid, if it does not contemplate a resort to secret means, or a fraud upon the public.⁴

¹ *McBratney v Chandler*, 22 Kan. 692;
Brown v Brown, 34 Barb. (N. Y.) 533;
Rose v Truax, 21 Barb. (N. Y.) 361;
Foley v Speir, 100 N. Y. 552;
Powers v Skinner, 34 Vt. 274;
 See also *Clippinger v Harbaugh*, 5
Watts & S. (Pa.) 315;

² *Brown v Brown*, 34 Barb. (N. Y.) 533;
 2 *Parsons Contracts*, 554.

³ *Simpson v Howden* (Lord), 10 A. & E.
 793; 9 Cl. & Finn. 61; 3 Railw. Cas.
 294;

Shrewsbury (Earl of) v North Stafford-
shire Railway Comp'y, 1 L. R., Eq.,
 593; 35 L. J., Ch. 156; 12 Jur., N. S.,
 63; 13 L. T. 648; 14 W. R. 220.

Of the ruling in *Simpson v Lord How-*
den, 10 A. & E. 793, it has been said:
 "This case, although in fact reversed
 in the Exchequer Chamber, and that
 judgment affirmed in the House of
 Lords, and chiefly upon the ground

that the plaintiff was not bound to
 communicate to the legislature the
 bargain he had made with the com-
 pany, seems finally to have prevailed,
 as most common sense decisions do,
 when opposed to merely technical
 views." 2 Story Eq. Jur., 12th ed.
 § 293 c.

⁴ *Shrewsbury & B. R'y Comp'y v London*
& N. W. R'y Comp'y, 2 Mac. & Gor-
 don, 324; 6 H. L. Cas. 113; 3 Mac. &
 Gordon, 70; 21 L. J. Q. B., 89; 17 A.
 & E. (N. S.) Q. B., 652;

Stanley v Chester & B. R'y Comp'y, 1
 Railw. Cas. 58, 67; 3 Myl. & Cr. 773;
 9 Sim. 264;

Edwards v Grand Junction R'y Comp'y,
 1 Railw. Cas. 173; 1 Myl. & Cr. 650; 7
 Sim., 337;

Eastern Counties R'y Comp'y v
Hawkes, 5 H. L. Cas. 331; 1 DeG. M.
 & G. 737; 24 L. J., Ch., 601.

§ 59. Contracts to procure particular official action.—

Another class of cases, governed by the same general rule, consists of those contemplating services for the purpose of procuring a particular official action from an executive or administrative officer. It was said, in one case that “a contract to procure a pardon from the governor would now be held illegal, whether improper means were used or not.”¹ But in a case in the New York superior court, it was held that a contract for the services of an attorney at law, in procuring a pardon for a convict, was legal. The court said: “It must be assumed that the parties had in mind, when this consultation took place, only such proper and legal acts, as the law allows an attorney to agree to perform. The employment is capable of that construction, and we cannot assume that the defendant intended to employ the plaintiff, or that the plaintiff intended to agree, to do any act in respect to obtaining the pardon, which was illegal, unless it was expressly so stated. . . . I think that a distinction should be made between an employment of this kind, and a contract to procure a pardon, made by a person who is not an attorney. Such a contract would be objectionable, because it would appear, on its face, that the means to be employed were influence or personal solicitation, or some others equally objectionable; while in this case the employment is to perform services in the line of the employee’s profession, which for any other object would be unobjectionable.”² This ruling has been followed in other cases;³ in some of which the distinction between an attorney and one who is not an attorney has been disre-

¹ *Bowman v Coffroth*, 59 Pa. St. 19, per Read, J., p. 23.

² *Bremsen v Engler*, 49 N. Y. Super. Ct., 172.

See also *Thompson v Wharton*, 7 Bush (Ky.) 563;

McGill v Burnett, 7 J. J. Marsh (Ky.) 640;

Timothy v Wright, 8 Gray (Mass.) 522; *Kribben v Haycraft*, 26 Mo. 396.

³ *Formby v Pryor*, 15 Ga. 258; *Moyer v Cantieny*, 41 Minn. 242.

garded.¹ But a contract to obtain signatures to a petition to the governor for the pardon of a convict is illegal.² Upon the same principle, it has been held that a contract to obtain signatures to a petition for a public improvement is illegal.³ So is a contract to abandon proceedings for opening a highway;⁴ or proceedings to unseat a member of the house of commons.⁵

§ 60. **Contracts to furnish supplies for public use.**—With respect to contracts to compensate a person, for efforts to procure favorable official action upon a proposition to furnish supplies to, or to do work for the government, there has been a conflict of authority upon the question whether such contracts are, in any case, lawful, and if so, what is the test of legality or illegality. The United States supreme court has determined that they are, under all circumstances, unlawful. The case was one, where an action was brought upon an agreement by the defendant below, to compensate the plaintiff below, for his services in procuring for the former a contract to furnish to the government a quantity of arms during the civil war. The court below ruled that the contract was lawful, and its judgment was reversed by the supreme court. Field, J., delivering the opinion of the supreme court, said: “The question then is this: can an agreement for compensation to procure a contract from the government to furnish its supplies be enforced by the courts? We have no hesitation in answering the question in the negative. All contracts for supplies should be made with those, and with those only, who will execute them most faithfully and at the least expense to the government. Considerations as to the most efficient and economical mode of meeting the public wants should alone control, in this

¹ *Bird v Breedlove*, 24 Ga. 623;

Bird v Meadows, 25 Ga. 251;

Chadwick v Knox, 31 N. H. 226.

³ *Maguire v Smock*, 42 Ind. 1.

⁴ *Jacobs v Tobiason*, 65 Iowa, 245; 54 Am. R. 9.

² *Hatzfield v Gulden*, 7 Watts (Pa.) 152.

⁵ *Coppock v Bower*, 4 M. & W. 361.

respect, the action of every department of the government. . . . Such is the rule of public policy; and whatever tends to introduce any other elements into the transaction is against public policy. That agreements, like the one under consideration, have this tendency, is manifest. They tend to introduce personal solicitation, and personal influence, as elements in the procurement of contracts, and thus directly lead to inefficiency in the public service, and unnecessary expenditures of the public funds." The learned judge considered then the cases, where agreements for compensation to procure legislation and appointments to offices have been declared to be void, and concluded that the same principle avoids the contract in question. "It is sufficient," he said, "to observe, generally, that all agreements for pecuniary considerations to control the business operations of the government, or the regular administration of justice, or the appointments to public offices, or the ordinary course of legislation, are void as against public policy, without reference to the question whether improper means are contemplated or used in their execution. The law looks to the general tendency of such agreements; and it closes the door to temptation, by refusing them recognition in any of the courts of the country." ¹

§ 61. The same subject; contracts for supplies, etc.—But, in a later case, the court of appeals of the state of New York refused to follow this ruling. In an action upon an agreement, appointing the plaintiff's testator the defendant's agent to dispose of four steamers, and agreeing to pay him a fixed proportion of the price, it appeared that the parties contemplated an effort to sell the steamers to the United States government, for use during the civil war; and that during the negotiations between them, the

¹ Tool company v Norris, 2 Wallace (U. S.) 45;

S. P. Oscanyan v Winchester, etc.,

Arms Company, 103 U. S. 261.

See also Beal v Polhemus, 67 Mich. 130.

defendant asked the plaintiff if he was "acquainted with the republican members of the administration," and received an assurance in the affirmative. A judgment in favor of the plaintiff was affirmed by the court of appeals. Hunt, J., after saying that there was no proof of any intention to resort to corrupt means, in order to effect the sale, and examining the preceding decisions, added: "A distinction may also well be made upon those cases, which I think will dispose of the present question. Personal solicitation of legislators or judges is not a lawful subject of contract. Personal solicitation of the president, the governor, or the heads of departments, for favors or for clemency, is not the lawful subject of a contract. The apprehension that considerations, other than those of a high sense of duty, and of the public interest, may thus be brought to influence their determination, forbids this employment. But a different principle prevails, where property is offered for sale to the government, and where a bargain is sought to be made with them, and where there is no concealment of the agency. It then becomes a matter of traffic. . . . The seller desires to obtain a high price, while the buyer desires to purchase at a low one. This element is known and appreciated by each party in making a bargain. I know of no principle upon which a seller should be compelled to employ an agent, who would be looked upon with suspicion and distrust by the party to whom he wished to sell. . . . An agent of the same political party with the executive, or the heads of departments, having acquaintances and a reputation which would enable him to make an advantageous presentation of his merchandise, may, in my opinion, be lawfully employed to make such sale, and with reference to those qualifications. The decision in *Norris v. The Tool Co.*, (2 Wallace 45,) confounds a sale or traffic, openly made by an avowed agent, to a party wishing to purchase, with the forbidden

case of an interference with legislative action, or executive clemency, where the party does not profess to act upon commercial principles. There is a manifest difference in the principle governing the cases. I think that case was not well considered, and cannot adopt it as an authority for the present.”¹

§ 62. **The same, and contracts for discharge of drafted men, etc.**—In an earlier case, the supreme court of New York had made substantially the same decision as in the case last cited, without referring to *Tool Company v. Norris*.² And the supreme court of Pennsylvania, in a case decided still earlier, held that a contract for compensation for procuring the discharge by the war department of a man drafted as a soldier was unlawful, without reference to the character of the means to be employed or actually employed.³ In Ohio, the case of *Tool Company v. Norris* was approved in principle, but a contract to compensate a person for his services in selling property to the government was sustained as lawful, on the ground that the agent's compensation, and the amount of the bid to be made by him for the principal, were fixed by the terms of the contract, which, the court thought, distinguished the two cases.⁴

§ 63. **Contracts between bidders, when void.**—Closely analogous to this class of cases are those where an agreement is made between persons bidding or intending to bid, upon proposals invited by the government to furnish services or property for the public use, for the purpose of awarding the contract to the lowest bidder. The general rule respecting such agreements has been stated thus: that any agreement between such bidders or intending bidders, which has a tendency directly or indirectly to

¹ *Lyon v Mitchell*, 36 N. Y. 235, 682.

² *Bowman v Coffroth*, 59 Pa. St. 19.

³ *Howland v Coffin*, 47 Barb. (N. Y.) 653;

⁴ *Winpenny v French*, 18 Ohio St. 469.

32 How. Pr. (N. Y.) 300.

restrain competition between them, is void as against public policy, even although it may not appear that such agreement actually produced a result detrimental to the public interest.¹ Thus an agreement to pay the promisee a certain sum, for forbearing to propose to the postmaster-general to carry the mail on a certain route, is void.² So is an agreement to pay the promisee for withdrawing a proposal to carry the mail.³ And a promise to a mail contractor, in consideration of repudiating his contract is void, although the government holds security, which will protect it against any loss.⁴ So an agreement between intending bidders for a public employment, that one shall bid in his own name, and all shall share the profits, is void.⁵ So an agreement not to bid, or to influence any other person to bid, for the labor of the inmates of a house of correction, is void.⁶ The same general rule has been declared and applied in several other cases.⁷

§ 64. **The same subject; certain contracts held valid.**— But this general rule is subject to some exceptions, which, although they are well established, it is difficult to define with precision. It has been said that contracts of this nature depend, for their validity, upon the same rules which determine the lawfulness of agreements between bidders, or intending bidders, at auction sales.⁸ And “agreements” (at auction sales) “between two or more persons, that all but one shall refrain from bidding, and

¹ *Atcheson v Mallon*, 43 N. Y. 147.

In *Breslin v Brown*, 24 Ohio St. 565, it was said that this rule is too broad, and that such agreements are not void, unless the public interests are injuriously affected thereby.

² *Gulick v Ward*, 10 N. J. L. 87.

³ *Swan v Chorpenning*, 20 Cal. 182.

⁴ *Weld v Lancaster*, 56 Me. 453.

⁵ *Woodruff v Berry*, 40 Ark. 251;

Hunter v Pfeiffer, 108 Ind. 197.

See also *Hannah v Fife*, 27 Mich. 172.

⁶ *Gibbs v Smith*, 115 Mass. 592.

⁷ *Kennedy v Murdick*, 5 Harr. (Del.) 458;
Ray v Mackin, 100 Ill. 246.
Engelman v Skrainka, 14 Mo. App., 438;
Wilbur v How, 8 Johns. (N. Y.) 444;
Sharp v Wright, 35 Barb. (N. Y.) 236;
Woodworth v Bennett, 43 N. Y. 273.

⁸ *People v Stephens*, 71 N. Y. 527, per Allen, J., pp. 545, 546.

permit that one to become the purchaser, are not, however, necessarily and under all circumstances, vicious. They may be entered into for a lawful purpose and from honest motives, and in such cases may be upheld, and will not vitiate the purchase.”¹ Thus it was held that an agreement between one who had filed his bid for a public improvement, and another who was about to file his bid, to do the work in partnership, if the contract was awarded to either, was valid, no intent being apparent to influence either bid or to stifle competition.²

§ 65. **Contracts to induce officer to violate duty.**—Upon the same principles, any contract with an officer or a third person, for the purpose of inducing the officer to violate his duty, is unlawful.³ Thus an agreement between an officer of the customs and a merchant, whereby the latter agrees to pay the former a compensation for laboring to obtain a reduction of the duties upon his imported goods, is void.⁴ So a note, given by a contractor for a public improvement, to one professing to have influence with the street commissioner, in order that he should use his influence with the street commissioner to enable the contractor to get his money, before it was due by the terms of the contract, is void.⁵ Other instances of the same kind will be given in the chapter relating to indemnity to an officer, being cases where he was indemnified against the consequences of a violation of his duty.⁶

¹ *People v Stephens*, 71 N. Y. 527, per Allen, J., p. 546.

See also *Marié v Garrison*, 83 N. Y. 14, rev'g 45 N. Y. Super. Ct. 157;

Fire Ins. Comp'y v Loomis, 11 Paige (N. Y.) 431;

Huntington v Bardwell, 46 N. H. 492;

Bellows v Russell, 20 N. H. 427;

Story's Eq. Juris. (12th Ed.) §§ 293-293 c; and, in England, *Jones v North*, L. R., 19 Eq. 426.

For a resumé of the exceptions to the rule forbidding combinations at auc-

tion sales, see *Story on Contracts*, 5th ed., § 677.

² *Breslin v Brown*, 24 Ohio St. 565.

See also *Atcheson v Mallon*, 43 N. Y. 147, per Folger, J., p. 151;

Dutch v Harrison, 37 N. Y. Super. Ct. 306.

³ *Moher v O'Grady*, 4 L. R. Ir. 54;

Cook v Shipman, 51 Ill. 316.

⁴ *Satterlee v Jones*, 3 Duer (N. Y.) 102.

⁵ *Devlin v Brady*, 36 N. Y. 531, aff'g 32 Barb. (N. Y.) 518.

⁶ *Post*, ch. 28.

§ 66. **Contracts stipulating reward to officer.**—The rule avoiding contracts to influence official conduct applies with increased force, where the contract is for a reward to the officer himself. Such a transaction is equivalent to corruption in office. Thus, where a bond was given to a member of the common council of a city, who was chairman of a committee having charge of the subject of certain wharfing privileges, and establishing and altering dock lines, to take effect when the lines, etc., were established as desired by the obligor so as to benefit his property, the court held that the bond was utterly void, and declared that the transaction amounted to bribery.¹ The illegality of transactions of this kind is so gross and palpable that it will be unnecessary to discuss the subject at length.² In one case, a contract to reward a board of officers for doing an official act was sustained, on the ground that it appeared that the reward would enure to the benefit of the public interest which they had in charge.³ But it may be safely stated, as a general rule, that any contract, having for its object the use of a public office for private benefit, or tending to accomplish that result, although not expressly so providing, is void.⁴

¹ *Cook v Shipman*, 24 Ill. 614; s. c. 51 Ill. 316.

² See *Woodworth v Bennett*, 43 N. Y. 273; *People v Lord*, 6 Hun (N. Y.) 390; *Bank of Monroe v State*, 26 Hun (N. Y.) 581.

³ *Odineal v Barry*, 24 Miss. 9.
See, contra, the remarks of Sir W. Page Wood, V. Ch'r, in *Liverpool v Wright*,

1 Johns. Ch. 359, quoted *ante*, § 52.

⁴ *Munsell v Temple*, 3 Gilm. (Ill.) 93;
Berry v Hamby, 1 Scam. (Ill.) 468;
Irish v Webster, 5 Me. 171;
Wheelwright v Sylvester, 4 Allen (Mass.) 59;
Hunter v Field, 20 Ohio 340;
McCartle v Bates, 29 Ohio St. 419.

BOOK II

FILLING AN OFFICE

CHAPTER VII

WHO MAY OR MAY NOT HOLD A PUBLIC OFFICE

CONTENTS

- SEC. 67. What offices an infant may hold, in the absence of any express prohibition.
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69. The same subject; American authorities.
70. The same subject continued.
71. To what extent unfitness to discharge the duties of an office disqualifies one from holding it.
72. Qualifications and disqualifications under the United States constitution; general principles as to disqualification, established by the "common political law."
73. Qualifications and disqualifications under state constitutions; power of the legislature to add other reasonable and consistent qualifications; whether a statute requiring the members of a public board to belong to different political parties is constitutional.
74. Legislature has power to exclude from office those convicted of crime, and require a period of citizenship, ability to read and write, and payment of taxes.
75. Various rulings upon the question whether bribery disqualifies, and upon particular provisions as applicable to bribery.
76. Cases where candidates have procured votes by public promises to accept less than the official salary, etc.
77. Rulings upon provisions disqualifying for crime.

- SEC. 78. Rulings upon the 14th amendment of the U. S. constitution, disqualifying certain persons who participated in the civil war, and similar provisions in the constitutions of some of the states.
79. Validity and effect of statutes requiring proof that public money has been accounted for.
80. Provisions relating to citizenship, residence, and the like; construction thereof.
81. Provisions forbidding one to hold two or more offices; validity and construction thereof.
82. Mode of determining questions relating to qualifications for office.
83. Effect of a provision forbidding a member of the legislature from holding an office created, etc., during his term.

§ 67. **What offices an infant may hold.**—At common law, a ministerial office may be granted to an infant, *exercend. per se, vel per deputat. suum*;¹ or to two or more; but a judicial office, or one which is of a judicial nature, cannot be thus granted.² Thus an infant cannot be steward of a court, for he cannot execute the office, but he may take a ministerial office, for he can execute it by deputy.³ The same rule has been declared in the American cases, which are few in number, because the constitutions or statutes of most of the states provide expressly against holding office by an infant. It has been held, however, that in the absence of any such prohibition an infant may hold the office of notary public; and in making this ruling, the United States circuit court cited an instance when the office of governor of a territory was held and very ably filled by an infant.*

§ 68. **What offices a woman may hold. English authorities.**—So it has been said that the grant of an

¹ Com. Dig. tit. Officer, B 3.

² Com. Dig. tit. Officer, B 4;
Bac. Abr. tit. Offices and Officers, I.

³ Bac. Abr. tit. Offices and Officers, I.

* *United States v Bixby*, 10 Blss. (U.S.) 520.

See also *Claridge v Evelyn*, 5 B. & Ald. 81; and, upon the general question, *In re Golding*, 57 N. H. 146;
Lynch v Livingston, 6 N. Y. 422;
Lambert v People, 76 N. Y. 220.

office of government, which may be exercised by a substitute or deputy, to a woman, will be good, as a woman may be made regent of the kingdom. So an office of inheritance may descend to a woman, and by consequence may be granted to her, as the office of marshal of England. So a woman may be a gaoler, or a commissioner of the sewers; so she may have custody of a castle; so she may be a forester, who shall make a deputy to attend the eyre, and he shall there be sworn.¹ A woman may be sexton of a parish, and may vote in the election of one.² So a woman may be overseer of the poor.³ Ann, countess of Pembroke, held the office of hereditary sheriff of Westmoreland, and exercised it in person; at the assizes she sat with the judges on the bench.⁴ The question as to the right of a woman to hold office in England was discussed at length in a very celebrated case, recently decided by the court of Queen's Bench, wherein it was held that a woman was incapable of being elected a member of a county council.⁵

§ 69. **The same subject. American authorities.**—In some of the states of the Union, the right of suffrage, and the power to hold office generally, or to hold particular offices, have been conferred expressly upon women; but in those where the constitution does not confer that power, the question whether a woman is competent to hold a public office, has arisen in several cases. In

¹ Com. Dig. tit. Officer, B 2, and cases cited.

² *Olive v Ingram*, 2 Str. 1114.

³ *Rex v Stubbs*, 2 T. R. (D. & E.) 395.

⁴ 2 T. R. (D. & E.) 397, note. See a very interesting discussion upon this statement by Gray, J., delivering the opinion *In re Robinson*, 131 Mass. 376. He concludes that she did not habitually discharge the duties

of the office, and that she could not have done so without violating the well settled law.

See a full collection of cases as to offices which women have filled, in the arguments of counsel in *Rex v Stubbs*, 2 T. R. (D. & E.) 395.

⁵ *Beresford Hope v Sandhurst (Lady)* 23 Q. B. D. 79; 58 L. J., Q. B., 316; 61 L. T. 150; 37 W. R. 548; 53 J. P. 805; aff'g 37 W. R. 525; 53 J. P. 549.

accordance with the English decisions it has been ruled that a woman cannot hold a judicial office, *ex. gr.*, that of justice of the peace.¹ But where a statute provides that no person shall be debarred from any "occupation, profession, or employment" on account of sex, and the constitution contains nothing to the contrary, a woman may hold an office pertaining to the administration of justice, as that of master in chancery.² In the absence of any constitutional prohibition, a statute authorizing a woman to be a member of a school committee is valid. "The common law of England, which was our law upon this subject, permitted a woman to fill any local office of an administrative character, the duties attached to which were such, that a woman was competent to perform them."³ A statute, conferring upon a woman the right to hold an office, is valid, although enacted after a judgment that she was ineligible.⁴ In the absence of any express constitutional or statutory provision on the subject, a woman cannot hold the office of jailer;⁵ or of director of a workhouse.⁶ The constitution and statutes of the United States contain no provision, expressly or impliedly prohibiting a woman from holding office under the authority of the United States; and appointments of women to national offices of a minor character are frequently made.

§ 70. **The same subject continued.**—The English and American authorities on the subject of the right of a woman to hold office were very fully stated and discussed by the supreme judicial court of Massachusetts, in a case which presented the question whether a woman might be examined for admission as an attorney and coun-

¹ Opinion of the Justices, 107 Mass. 604.

³ Opinion of the Justices, 115 Mass. 602.

² *Schuchardt v People*, 99 Ill. 501.

⁴ *Huff v Cook*, 44 Iowa 639.

See, *In re Hall*, 50 Conn. 131;

⁵ *Atchinson v Lucas*, 83 Ky. 451.

Atchinson v Lucas, 83 Ky. 451;

⁶ *State v Rust*, 4 Ohio Cir. Ct. 329.

In re Goodell, 48 Wis. 693.

seller at law, under a statute authorizing "a citizen of the state," having certain qualifications, to be so examined and admitted. The court, while conceding that the word "citizen" included a woman, nevertheless concluded, upon an interpretation of the statute, "in connection with the whole system of which it forms part, and in the light of the common law and of previous statutes on the same subject," that it was the intent of the statute to give the right to male citizens only. In the voluminous and exhaustive opinion delivered by the court, it was said that there is no instance in England where a woman "could take part in the government of the state," except in the case of a queen; or hold "any public office the duties of which must be discharged by the incumbent in person," except that of overseer of the poor, "a local office of an administrative character, in no way connected with judicial proceedings."¹

§ 71. **To what extent unfitness disqualifies one from holding an office.**—The common law declares that unfitness, if gross and palpable, is a disqualification for holding an office. Thus it has been said: "If an office, either of the grant of the king or subject, which concerns the administration, proceeding, or execution of justice, or the king's revenue, or the common wealth, or the interest, benefit, or safety of the subject, or the like; if these or any of them be granted to a man that is unexpert, and hath no skill and science to exercise or execute the same, the grant is merely void, and the party disabled by law, and incapable to take the same, *pro commodo regis et populi*; for only men of skill, knowledge, and ability to exercise the same, are capable to serve the king and his people."² It is needless to say that the practical application of this

¹ *In re Robinson*, 131 Mass. 376.
 Accord, *In re Lockwood*, 9 Ct. of Cl.
 (U. S.) 346;
In re Bradwell, 55 Ill. 535;

In re Goodell, 39 Wis. 232.
 See also *Wright v Noell*, 16 Kan. 601.
² *Bac. Abr.*, tit. Offices and Officers, I,
 citing several cases.

doctrine is generally very difficult, and, as far as our examination has extended, there is but one case in the United States, where it has been applied. That case arose in the court of common pleas for the city and county of New York. A person, who was ignorant of any foreign language, had been appointed interpreter for one of the district courts of New York city, and brought an action against the city to recover his salary. It was held that he could not recover. The court said: "In a case of a person duly appointed to an office or public employment, the rule undoubtedly is that the fitness of the appointment cannot be questioned, if he satisfies the appointing authority, in an action for the compensation attached to the office or employment, if such person performs or is ready to perform the duties required of him in his position. But the present is the case of one alleged to be wholly incompetent. There is no attempt to prove that the plaintiff is unsuited or unfit for the position he held, except in the sense of being at all times unable to perform its duties. By accepting the position of interpreter, when, if he understood no foreign language, he could not interpret at all, he stands convicted of a fraud, either upon the officer who appointed him, and upon the public from whom he was to receive compensation, or upon the latter alone."¹

§ 72. **Qualifications and disqualifications under U. S. constitution and "common political law."**—In the United States, the qualifications for holding office are prescribed by either constitutional provisions or legislative enactments, relating to offices generally, or to particular offices. Thus the constitution of the United States requires that the person holding the office of president of the United States shall be a natural born citizen, of the age of thirty-five years, who has been a resident within the

¹ *Conroy v Mayor, etc.*, 6 Daly (N. Y.) 490, aff'd (no op'n), 67 N. Y. 610.

United States fourteen years;¹ that a senator shall have attained the age of thirty years, shall have been nine years a citizen of the United States, and shall be, when elected, an inhabitant of that state from which he shall be chosen;² that a representative shall have attained the age of twenty-five years, shall have been seven years a citizen of the United States, and shall be an inhabitant of that state from which he shall be chosen;³ and that no person shall hold any office under the United States, or under any state, who, having previously taken an official oath to support the constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof; unless the congress shall, by a vote of two thirds, of each house, remove such disability.⁴ Similarly each state has regulated for itself, and according to its own ideas of public policy, the general qualifications for holding office, or the qualifications for holding particular offices, under the authority of the state. Certain general principles are common to all, and these are styled by a learned writer "the common political law" of this country. We quote a few sentences from his work, in this connection: "The same descriptions of persons, namely minors, idiots, and lunatics, women, and aliens, who have already been mentioned as excluded from the right of suffrage by the common political law, are also prohibited and for the same reasons, from being elected to any political office whatever." . . . "It may also be laid down as a general principle, founded in the nature of representative government, which presupposes the electors, except in particular instances, to elect from among themselves, that no person can be elected to any office

¹ U. S. Const., Art. II, Sec. 1, Subd. 5.

² Id., Art. I, Sec. 3, Subd. 3.

³ Id., Art. I, Sec. 2, Subd. 2.

⁴ Id. Art. 14 (commonly called the fourteenth amendment) Sec. 3; adopted in 1868.

See *post*, § 73.

who is not himself possessed of the requisite qualifications for an elector; and . . . whatever other and different qualifications or disqualifications may be specified, every person who is voted for . . . must, at all events, possess the qualifications, and be free from the disqualifications which attach to the character of an elector.”¹

§ 73. **Under state constitutions; power to add qualifications; differing political parties.**—It is clear that where the constitution prescribes the qualifications for holding office, any act of the legislature, contravening directly or indirectly the mandates of the constitution in that respect, is unconstitutional. This doctrine, and the extent to which the legislature may require an examination and certificate by a civil service commission, as a requisite to eligibility to office, will be fully considered in a subsequent chapter.² The general rule is that the legislature has full power to prescribe qualifications for holding office, in addition to those prescribed by the constitution, if any, provided that they are reasonable, and not opposed to the constitutional provisions, or to the spirit of the constitution. Thus it is believed that there can be no valid constitutional objection to the statutes, which are now very common, prescribing special qualifications for particular offices, as that the person filling the same shall be a lawyer, a physician, an architect, or otherwise skilled in the particular duties devolved upon him by the office.³ In some instances, where a board of officers has been created by statute, provision has been made that they

¹ Cushing's Legislative Assemblies, Arts. 56, 57. It has been said that at common law, an alien-born person, although naturalized, is not entitled to hold office.

Rex v DeMierre, 5 Burr. 2787;

¹ Blackst. Commen., 374. The same rule has been declared in the United States, except that naturalization

removes the disqualification. *Walther v Rabolt*, 30 Cal. 185; *State v Smith*, 14 Wis. 497; *State v Murray*, 23 Wis. 96.

² Post, ch. 9.

³ See *People v May*, 3 Mich. 598, and ante, § 71.

shall be taken in certain proportions from the different political parties. It was held by the supreme judicial court of Massachusetts, that a statute creating a board of police for a city, of which the members should be thus appointed, was constitutional.¹ And the court of appeals of the state of New York has also affirmed the constitutionality of a similar statute.² But the supreme court of Michigan has ruled that a similar statute was unconstitutional, as being in contravention of the doctrine that political opinions cannot be made the test of the right to hold office.³

§ 74. **Power of legislature to exclude from office certain persons.**—A statute, providing that a person, convicted of having fought a duel, shall be incapable of holding or being elected to office under the state, is constitutional.⁴ “I conceive it,” said the chancellor, delivering the opinion of the court of errors, “to be entirely clear, that the legislature cannot establish arbitrary exclusions from office, or any general regulation requiring qualifications, which the constitution has not required. If, for example, it should be enacted by law, that all physicians, or all persons of a particular religious sect, should be ineligible to public trusts; or that all persons not possessed of a certain amount of property should be excluded; or that a member of assembly must be a freeholder; any such regulation would be an infringement of the constitution: and it would be so, because, if it should prevail, it would be, in effect, an alteration of the constitution itself. . . . but, as a right not expressly secured by the constitution, it” (the right of eligibility to office) “may be taken from convicted criminals, when the legis-

¹ *Comm. v Plaisted*, 148 Mass. 375.

² *Rogers v Buffalo*, 123 N. Y. 173.

³ *Att’y Gen’l v Detroit Common Council*, 58 Mich. 213.

See also *Evansville v State*, 118 Ind. 426;

Baltimore v State, 15 Md. 376;

Brown v Haywood, 4 Heisk. (Tenn.) 357.

⁴ *People v Barker*, 20 Johns. (N. Y.) 457; *aff’d*, p. r., 3 Cow. (N. Y.) 686.

lature, in their plenary power over crimes, deem such a privation a necessary punishment.”¹ And where a constitutional provision declares that no person shall be elected to any office, unless he possesses the qualifications of an elector, that does not by implication forbid the legislature to require other reasonable qualifications for office, as that the person elected shall have been a citizen for three years, and able to read and write in the English language, or shall have paid taxes.²

§ 75. **Various rulings regarding bribery.**—The statute 5 and 6 Edward VI, ch. 16, disqualifies a person from holding office, who has resorted to bribery to procure it. It has been said also that at common law the same rule holds.³ But this doctrine, although it appears to be supported by one decision,⁴ is not generally recognized in the courts of this country. The weight of authority sustains the doctrine that in the absence of any constitutional or statutory provision, disqualifying from holding office, a person guilty or convicted of crime, such a person is not so disqualified.⁵ This is the rule, although the crime consisted of bribery or other unlawful act, relating to his election or appointment; and although the statute or the constitution not only punishes as a crime the giving or receiving of a bribe to influence the vote of an elector, but excludes such elector from the right to vote; and the constitution requires the officer to qualify by taking an oath that he has not thus influenced any person for giving or withholding his vote.⁶ “Wrong-doing or criminal

¹ *Barker v People*, 3 Cow. (N. Y.) 686, per Sanford, Chancellor, pp. 703, 704, 706.

² *State v Covington*, 29 Ohio St. 102.
Accord, *Darrow v People*, 8 Colo. 417.
 See also *post*, §§ 77, 79, 81.

³ Per Lord Glenbervie, 2 Douglas Election Cases, 403. He says that the House of Lords has so determined.
 See, further, as to bribery, *post*, ch. 32.

⁴ *State v Purdy*, 36 Wis. 213.

⁵ *State v Pritchard*, 36 N. J. L., 101;
People v Goddard, 8 Colo. 432;
People v Thornton, 25 Hun (N. Y.) 456;
 rev'g 60 How. Pr. (N. Y.) 457;
State v Dustin, 5 Oreg. 375.

⁶ *People v Thornton*, 25 Hun (N. Y.) 456;
 rev'g 60 How. Pr. (N. Y.) 457;
 See also *People v Goddard*, 8 Colo. 432;
State v Pritchard, 36 N. J. L., 101.

conduct," said the court, "which will constitute or work ineligibility or disability to hold office, to be enforced through the judicial power of the state, must be expressly defined and declared by the constitution or laws. Granting, then, that the promises and pledges, made by the defendant to the electors of the county, constituted an offer of a bribe to them to cast their votes for him, where in the constitution or the law is such offer declared to create ineligibility to office? . . . The offer of a bribe to an elector is unquestionably a grave offence, and is punishable as such; but it is punishable only in the manner and to the extent prescribed by the constitution and the laws. . . . The law requires that a person elected to office shall take and subscribe the requisite oath of office, and that if he shall omit to do so within the prescribed period, the office shall become vacant. But it does not further declare that the office shall also be deemed vacant, if the officer shall not swear to the truth in taking such oath, or that he shall in that case be disqualified from holding the office."'

§ 76. **Public promises to accept less than official salary, etc.**—In most of the cases, wherein the doctrine just stated was established, the successful candidate for a county office, had, during the contest for votes, issued public and general appeals to the voters of the county for support, promising, in case he should be elected, to accept from the county treasury a smaller sum than the salary attached by law to the office, or to devote a specified portion of his salary to the benefit of the county. It is conceded, in all the cases, that such offers are legally not to be distinguished from direct offers of pecuniary reward for a vote; and in some of the cases, the trans-

' *People v Thornton*, 25 Hun (N. Y.) 456, per Bockes, J., pp. 463, 464, 468. These remarks, and the decision in the cause, are based upon the fact that

the party had not been convicted; for the statute disqualified a person convicted of bribery, etc.

action is also likened to a sale of the office. But, owing to the general character of the offer, it is necessary, where the question arises whether the successful candidate can hold the office, to prove affirmatively, that of those who voted for him, a number at least equal to the majority certified in his favor, were induced by such promises so to vote;¹ and in one case it was held, that it must also be shown that they were taxpayers, or would in some other mode be benefited by performance of the promise.²

§ 77. **Rulings upon provisions disqualifying for crime.**—Under a provision of the constitution of Pennsylvania, disqualifying a person from holding an office, who had been convicted of “misbehavior in office or of any infamous crime,” it was held that a conviction for bribing a voter did not disqualify, on the ground that such an offence was not within the legal definition of “infamous crime.”³ But, in the same state, it was held, that in a suggestion for a quo warranto, an allegation that money was paid by the party for other than the election expenses expressly authorized by statute, “but for corrupt and illegal purposes in procuring his election,” is sufficient to bring the case within a constitutional provision disqualifying from holding office any one guilty of wilful violation of any election law.⁴ In the same state it was also held that the word “guilty,” as used in the same constitutional provision, did not render it necessary that the offender should have been convicted of the offence, before proceedings to oust him were begun.⁵

§ 78. **Rulings upon the 14th amendment and similar state provisions.**—The provision of the fourteenth amend-

¹ *State v Purdy*, 36 Wis. 213.

Accord, *Carrothers v Russell*, 53 Iowa 346;

People v Thornton, 25 Hun (N. Y.) 456.

² *State v Dustin*, 5 Oreg. 375.

³ *Comm. v Shaver*, 3 Watts & S. (Pa.) 338.

⁴ *Comm. v Walter*, 86 Pa. St. 15.

⁵ *Comm. v Walter*, 83 Pa. St. 105.

ment to the constitution of the United States, excluding from office all persons, who after having taken an oath of office to support the constitution of the United States, participated in the insurrection against the government,¹ and similar provisions in the constitutions and laws of some of the states, have been construed and applied in the adjudicated cases collected in the note.²

§ 79. **Validity and effect of statutes requiring proof that public money has been accounted for.**—It has been held that a statute requiring a sheriff elect, who has formerly been sheriff, to produce his tax receipts before being inducted into office, is not unconstitutional, as imposing qualifications for the office additional to those required by the constitution.³ A constitutional provision, excluding from office any holder of public moneys, who shall not have accounted for them and paid them over according to law, presupposes a default ascertained and fixed by legal authority.⁴ Such a provision applies to a private person, as well as to one who has been an officer.⁵ Where a constitutional provision excludes from office one who has failed to obtain a discharge from the proper authority from liability incurred from handling public moneys, a discharge granted by competent authority cannot be attacked. In a proceeding to test the party's eligibility, the only issue is upon the fact of his discharge.⁶ Where a statute provides that a person is not eligible to an office until he has

¹ *Ante*, § 72.

² *Lockhart v Troy*, 48 Ala. 579;
In re executive communication, 12 Fla.
651;

Privett v Stevens, 25 Kan. 275;

Privett v Bickford, 26 Kan. 52;

McAllister v State, 6 Bush (Ky.) 581;

State v Watkins, 21 La. Ann. 631;

Hudspeth v Garrigues, 21 La. Ann. 684;

State v Lewis, 22 La. Ann. 33;

Worthy v Barrett, 63 N. C. 199;

Bridgman v Mallett, 1 Winst. L. & E.

(N. C.) 112;

In re Griffin, 25 Tex. Supp. 623;

In re Greathouse, 2 Abb. (U. S.) 332;

Ex parte Garland, 4 Wall (U. S.) 333;

Knote v United States, 95 U. S. 149.

³ *State v Dunn*, 73 N. C. 595.

See also *ante*, § 74.

⁴ *Cawley v People*, 95 Ill. 249.

⁵ *Hoskins v Brantley*, 57 Miss. 814.

⁶ *State v Echeveria*, 33 La. Ann. 709.

accounted for and paid over all public moneys formerly received by him officially, it suffices that he accounts for and pays over the same before his official term begins, although he was in default when he was elected.¹ The same ruling has been made under a statute providing that a person is not eligible to an office in a city, if he is in arrear for any tax due to the city; and it was further held that he was qualified when he paid all that the collector said was due, although a small sum was omitted.²

§ 80. **Provisions relating to citizenship, residence, and the like; construction thereof.**—Where a state constitution provided that “no person shall be elected or appointed as a county officer, who shall not be an elector of the county; nor any one who shall not have been an inhabitant thereof during one year next preceding his appointment,” it was held that a person who had been an inhabitant of the county for more than a year before the election, but was naturalized as a citizen less than two months before the election, was eligible to a county office.³ And where a “voter” of a county is declared to be eligible to office, it is not necessary that he should be a citizen of the United States, if he is a voter under the constitution of the state.⁴ Where a certain period of residence is required, in order to render a person eligible to office, it has been held in some cases, that the requisite period must have expired before the election, and that its expiration before the beginning of the term will not suffice.⁵ The word “residence,” used in a statute to designate a qualification for holding office, is equivalent to “domicil,” and if it is uncertain where the domicil of a person is, the question, in an action to try his title, is one of fact;

¹ Brown v Goben, 122 Ind. 113.

² People v Hamilton, 24 Ill. App. 609.

³ State v Kilroy, 86 Ind. 118.

⁴ McCarty v Froelke, 63 Ind. 507.

See also Smith v Moody, 26 Ind. 299.

State v Fowler, 41 La. Ann. 380;

State v Abbott, 41 La. Ann. 1096.

⁵ Parker v Smith, 3 Minn. 240;

State v McMillen, 23 Nebr. 385.

and evidence as to the place where he has voted, is strong, if not conclusive evidence, that his residence was in that place.¹

§ 81. **Provisions forbidding holding two or more offices; validity and construction thereof.**—A statute providing that a person holding one office shall not be eligible to another, is not unconstitutional, as infringing upon the right of an elector to vote or to be elected to any office.² Such a provision, it is said, means, not that the person cannot hold the office, but that votes cast for him for the office are void.³ But where a provision of the constitution creates a disability “to hold office, until such disability be removed,” if the disqualification is removed after the election, and before the assumption of the office, the person elected may take the office.⁴ In such a case the votes cast for him are not void; and the broad assertion, that votes cast for a candidate absolutely disqualified are void, is at least of questionable correctness. This subject will be further considered in the chapter relating to elections by the people.⁵

§ 82. **Mode of determining questions relating to qualifications for office.**—The question whether a person elected or appointed to an office is qualified to hold it,

¹ *People v Platt*, 117 N. Y. 159, aff'g 50 Hun (N. Y.) 454.

² *People v Clute*, 50 N. Y. 451; 10 Am. R. 503, rev'g 63 Barb. (N. Y.) 356, and aff'g 12 Abb. Pr. N. S. (N. Y.) 399. See also *ante*, §§ 38-40.

³ *Id.* Accord, *State v Clarke*, 3 Neva. 566; *Spear v Robinson*, 29 Me. 531. And see *People v Leonard*, 73 Cal. 230. For other rulings, under constitutional or statutory provisions of this character, see *Crawford v Dunbar*, 52 Cal. 36;

Dailey v State, 8 Blackf. (Ind.) 329;

Kerr v Jones, 19 Ind. 351;

Smith v Moore, 90 Ind. 294;

Vogel v State, 107 Ind. 374;

Bouanchaud v D. Hebert, 21 La. Ann. 138.

A prohibition applicable to a state office does not apply to a municipal office. *State v Kirk*, 44 Ind. 401.

⁴ *Privett v Bickford*, 26 Kan. 52; 40 Am. R. 301.

⁵ See also *State v Murray*, 28 Wis. 96;

State v Trumpf, 50 Wis. 103;

Wood v Bartling, 16 Kan. 109.

⁶ *Post*, ch. 9.

must be determined in a direct proceeding to test his title.¹ Thus, although the statute disqualifies an infant, yet if an infant has been elected, the proper officer has no right to refuse to administer to him the official oath.² Nor can an issue upon the eligibility of an officer be presented upon a mandamus to compel the payment of his salary.³ But where a person claiming to be a member of a board of officers, seeks by mandamus to compel the other members of the board to recognize him, the latter may set up his disqualification.⁴

§ 83. **Member of legislature and office created during his term.**—Where the constitution of a state disqualifies a member of the legislature from holding an office, which shall have been created, or the emoluments whereof shall have been increased during his official term, this does not prevent a member from holding an office, the emoluments of which were increased during his term, but after his election to that office.⁵

¹ *Hall v Luther*, 13 Wend. (N. Y.) 491;
Hamlin v Dingman, 5 Lans. (N. Y.) 61;
People v Hopson, 1 Denio. (N. Y.) 574;
Mayor, etc., v Tucker, 1 Daly (N. Y.) 107;
Buffalo v Mackay, 15 Hun (N. Y.) 204.
 See also *Satterlee v San Francisco*, 23
 Cala. 314;
Douglass v Wickwire, 19 Conn. 489;
Facey v Fuller, 13 Mich. 527;
Bean v Thompson, 19 N. H. 290;

Comm. v McCombs, 56 Pa. St. 436.
Post, ch. 30.

² *People v Dean*, 3 Wend. (N. Y.) 438.

³ *Turner v Melony*, 13 Cala. 621.

⁴ *People v Sheffield*, 47 Hun (N. Y.) 481;
Accord, Pucket v Bean, 11 Heisk.
 (Tenn.) 600.
 See *post*, §§ 826, 827.

⁵ *State v Boyd*, 21 Wis. 208.

CHAPTER VIII

APPOINTMENT BY ONE OR MORE OFFICERS OR BOARDS

CONTENTS

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93. Validity of appointment made "at" expiration of incumbent's term, or after the time specified by statute.

94. Appointment, where made clandestinely and *mala fide* by part of appointing officers, invalid; so where made by vote of one whose term had expired.

II. Validity and effect of statutes, requiring appointments to be made after examination by, and upon the recommendation of, a civil service commission; or giving preferences respecting appointments to discharged soldiers or sailors.

95. Such statutes not obnoxious to a constitutional prohibition of tests, or a constitutional provision for appointment

by local officers; but are unconstitutional where constitution grants an officer absolute power to appoint his subordinates.

- SEC. 96. Where not unconstitutional, will be enforced by mandamus; or by refusing salary to officer appointed in violation thereof; or by action for compensation.
97. Preference to veterans not absolute, but only over others equally qualified; when they must comply with civil service rules; when statutes prevent retirement of veteran under former statute.
98. Preferential statute confined to original appointments, and not applicable to promotions; or where office is abolished for economical reasons; miscellaneous rulings as to construction, etc., of such statutes.

III. Appointment made upon nomination by one officer, and confirmation by, or consent of other officers.

99. Most common instance is where governor appoints, and senate confirms.
100. If consent of senate required only when in session, appointment by governor during long recess is absolute; if consent of senate absolutely required, governor cannot revoke appointment made during recess, and person appointed holds till rejected by senate.
101. Where mayor is empowered to fill vacancy for full term, or appoint temporarily, subject to confirmation by common council, appointment, etc., temporarily during vacancy, is not for full term; but appointment for less than the statutory term is for a full term.
102. In case of appointments subject to confirmation, person nominated must have a majority of confirming body.
103. Rule where there are several districts, and appointment does not specify the district.

IV. Appointment made by one or more boards of public officers, or by the concurrent action of three or more separate public officers.

104. Questions relating generally to the exercise of powers by such bodies, will be considered in this division.
105. English rule that where a power pertaining to public affairs is granted to several, the act of the majority will conclude the minority, only when all are regularly assembled.

- SEC. 106. American cases following this ruling; if there are any vacancies, board cannot act, although a majority is in office.
107. When all convened, minority cannot prevent action of majority, by withdrawing; action by part without the rest, not validated by the latter's subsequent assent; but validated by subsequent ratification in full meeting.
108. Presumption in favor of validity; but if statute requires validity to appear on face of proceedings, they must show that all met, etc.
109. Rule in some cases extended to private transactions, etc.; such cases disapproved.
110. Various rulings as to whether particular statutes affect the rule, or otherwise.
111. Obvious inconveniences of a rule which requires all to meet; modified by English authorities, in case of municipal and other corporations, so as to allow notice to be a substitute for presence.
112. American authorities applying this modified rule to all cases of public concern, by holding that if any member of the board fails to attend upon notice, the others may act as if he was present.
113. Rulings as to the sufficiency of the notice; when participation precludes objection.
114. Rule fixing time of stated meeting, or statute fixing time of action, dispenses with notice; powers of stated meeting; rule as to adjournments.
115. Doctrine as to notice, etc., extended to jury to appraise damages.
116. Rulings as to mode and validity of appointment, where power is conferred upon two or more separate bodies.
117. The same subject; rules where they are to meet to compare nominations, and vote if the nominations do not agree.
118. Rule where majority refuse to obey statute; and where a constituent officer so refuses.
119. Construction of votes of concurrence or non-concurrence where two separate bodies act.
120. Whether power to appoint is or is not judicial; when body so empowered cannot appoint one of its members.
121. Rulings as to the validity of official action, when majority had previously settled upon its action by means of a "caucus."

I. General rules of law relating to appointments; when an appointment is or is not complete.

§ 84. **Distinction between "election" and "appointment."**—In common parlance, the choosing of an officer by one or more bodies, to whom the law has given power to fill the office, is often called an election. But in strict correctness "whenever the office is to be conferred by the people, or by any considerable body of the people, it is spoken of as an election; whenever it is to be conferred by an individual, as by the governor, or by a select number of individuals, as by a judicial court, or by the general assembly, it is spoken of as an appointment."¹ And the fact that a statute, prescribing that certain officers shall be chosen by local boards, uses the word "election," does not affect the question, for the mode prescribed "is in legal affect an appointment."² On the other hand, an appointment by the governor or other officer is not an "election," so as to satisfy a provision of the constitution directing an election in certain cases.³

§ 85. **Power of appointment may be granted by legislature to unofficial persons.**—In the absence of any direction in the constitution of a state, respecting the persons who may exercise the power of appointment, it is competent for the legislature to confer the power upon unofficial individuals. Thus the constitution of New York, after prescribing the manner of electing or appointing county, city, town, and village officers, whose election or appointment is not otherwise specially provided for in the constitution, declares that "all other officers whose election or appointment is not provided for by this constitution, and all officers whose offices may hereafter be created by law,

¹ *State v McCollister*, 11 Ohio, 46, per Hitchcock, J., p. 52.
See also *Carpenter v People*, 8 Colo. 116;
People v Lord, 9 Mich. 227;

People v Bull, 46 N. Y. 57.

² *Sturgis v Spofford*, 45 N. Y. 446, aff'd in part, 52 Barb. (N. Y.) 436.

³ *Speed v Crawford*, 3 Met. (Ky.) 207.

shall be elected by the people or appointed, as the legislature may direct." The legislature, by a statute passed subsequently to the adoption of the constitution, created a board of commissioners of pilots, to have charge of the licensing and regulation of pilots for the port of New York, and the general subject of pilotage in that port, consisting of five persons, three of whom were to be appointed by the chamber of commerce of the city of New York, and two by the presidents and vice-presidents of the marine insurance companies of the city, composing or represented in the board of underwriters.¹ In an action for penalties imposed by that statute, upon persons employing unlicensed pilots, it was objected that the statute was unconstitutional. The court of appeals held that the commissioners were not county, city, village, or town officers, but officers of the state, and that the language of the constitution, "appointed as the legislature may direct," did not restrict the power of appointment to an officer or officers representing or responsible to the people; and therefore that the statute was constitutional.²

§ 86. **Appointment valid only when in writing.**—It was held by the supreme court of New York, that, in the absence of a statutory or constitutional requirement that an appointment should be in writing, an oral appointment was sufficient.³ In a subsequent case in the court of appeals, this ruling was questioned, but the court went no further than to hold that an informal written instrument, which had not been delivered to the officer appointed, was sufficient. In the case referred to, the mayor of a city sent to the common council a written communication, nominating three persons to be excise commissioners, and the common council by resolution confirmed the nomina-

¹ N. Y. L. 1853, ch. 467; 3 R. S., N. Y., 8 ed., 2266.

part, 52 Barb. (N. Y.) 436.

See also, *In re Bulger*, 45 Cal. 553.

² *Sturgis v Spofford*, 45 N. Y. 446, aff'g in

³ *People v Murray*, 5 Hun (N. Y.) 42.

tions. It was then supposed that the statute required such confirmation; but the court of appeals afterwards decided, in another case, that the mayor alone had the power of appointment. The court held in this case, that the mayor's communication to the common council was a sufficient appointment and commission.¹ Subsequently the question, whether a written appointment was necessary, was presented to the court of appeals, in a case arising under the same statute, where the mayor, at a meeting of the common council, orally stated that he nominated certain persons for excise commissioners; whereupon the common council passed a resolution, which was entered in the minutes, confirming the nomination. The court, holding that under the ruling in the other case, the action of the common council was a nullity, and so the record of the confirmation had no efficiency, stated that the only act of the mayor's was his oral appointment; and, after a full examination of the cases in England and America, concluded that an oral appointment to an office was invalid at common law, and by implication under the statute.²

§ 87. **The same subject; when appointment is complete.**—So it has been held that an appointment to an office by a board is not complete, until a certificate thereof has been made and signed, until which time the appointment may be revoked.³ But in another case it was held that a written resolution duly entered in the minutes of

¹ *People v Fitzsimmons*, 68 N. Y. 514.

² *People v Murray*, 70 N. Y. 521, rev'g 8 Hun (N. Y.) 579, and incidentally 5 Hun (N. Y.) 42.

The opinion of the court delivered by Allen, J., cited *Hunt v Ellisden*, 2 Dyer, 152 (b); *Curles's Case*, 11 Coke 2, (b); and *Craig v Norfolk*, 1 Mod. 122, in support of the doctrine that an oral appointment is invalid at common law. The learned judge exam-

ined fully and carefully, *Saunders v Owen*, 2 Salk. 467; 12 Mod. 199; s. c., *sub nom.*, *Owen v Saunders*, 1 Ld. Ray. 153, which has been supposed to hold the contrary doctrine; and he concluded that the decision turned upon the language of the statutes of Hen. VIII and W. & M.

See also, *post*, ch. 13.

³ *Cooner v Gilmer*, 32 Cal. 75.

See also *Wood v Cutter*, 138 Mass. 149.

the common council of a city rendered the appointment complete, although the mayor refused to attest it.¹ A village trustee, appointed to fill a vacancy, must have a commission or other written proof of his appointment, signed by the president of the board of trustees to support his claim to be put in office.²

§ 88. **The same subject; rescission of completed appointment, etc.**—The questions arising upon the legality of the reconsideration or rescission of an appointment are considered incidentally, in connection with the subject of removal, in a subsequent chapter.³ But some remarks thereupon are required here, in order to determine when an appointment is deemed to be complete. An elected officer, who dies before his commission is issued, is deemed to have been in office while he lived, so that his death creates a vacancy.⁴ But an appointment by the executive, by and with the consent of the senate, is proved only by a commission, and it has been said that after nomination and confirmation, the executive may decline to complete the appointment by withholding his signature to the commission. But the actual transmission of the commission is not essential to the completion of the appointment.⁵ Thus it has been held that where a person has been nominated to an office by the president of the United States, and confirmed by the senate, and his commission has been signed and sealed, his appointment is complete. If he is to perform certain acts, or conditions precedent to a complete investiture of the office, these do not affect his appointment. The transmission of the commission to him is not essential to his investiture of the office. If it fails to reach him, his possession of the office

¹ *People v Stowell*, 9 Abb. N.C. (N.Y.) 456.

⁴ *Gold v Fite*, 2 Baxter (Tenn.) 237.

² *People v Willard*, 44 Hun (N. Y.) 580.

⁵ Story on Const. § 1546;

³ *Post*, ch. 16, §§ 349; *et seq.*

Marbury v Madison, 1 Cranch (U. S.) 137.

See also, *post*, § 100.

is as lawful as if it was in his custody. Accordingly, where the president died after signing the commission, but before the transmission thereof to the person appointed, and before the latter had executed his official bond or taken his official oath, it was held that the appointment was complete, and the person appointed, on qualifying as prescribed by law, was entitled to the office.¹

§ 89. **When appointing body may or may not reconsider its action.**—Where the two branches of a city council meet in joint convention for the purpose of appointing a city officer, and the ballots are taken and counted, but, before the result is declared, the meeting agrees to vote anew, and thereupon another person is chosen, the second appointment is valid.² But it was held in Maine, that after a city officer has been declared to be chosen by the board of aldermen, and the declaration recorded, the board cannot at any adjourned meeting, held the next day, reconsider its action and choose another.³ In New York, where the supervisors of a county, under a general statutory power to make rules for the conduct of their proceedings, adopted a rule that a motion for reconsideration might be made by any member, but only on the same day, or the day following that on which the decision proposed to be reconsidered was made; and on the 2nd of January a resolution was adopted, appointing B librarian for the year; and on the 3rd of January, a motion to reconsider that resolution was made and adopted; and on the 4th the resolution was rescinded; and on the 7th a resolution appointing K librarian was adopted; it was held that K's appointment was valid.⁴

¹ *United States v Le Baron*, 19 How. (U. S.) 73.

See also *Hill v State*, 1 Ala. 559;

Jeter v State, 1 McCord (S. C.) 233;

State v Lylies, 1 McCord (S. C.) 238;

Marbury v Madison, 1 Cranch (U. S.) 137;

Justices v Clark, 1 T. B. Mon. (Ky.) 82;

Johnston v Wilson, 2 N. H. 202, as cited post, § 164.

² *Baker v Cushman*, 127 Mass. 105;

Putnam v Langley, 133 Mass. 204.

³ *State v Phillips*, 79 Me. 506.

⁴ *People v Mills*, 32 Hun 459.

See *State v Hamilton Co.*, 7 Ohio 134, at p. 145.

§ 90. **Subsequent appointment before expiration of term, etc.**—Where an office has been once filled by an appointment, it cannot be deemed vacant until the expiration of the term for which the appointment was made, or the death, resignation or removal of the person so appointed.¹ Therefore where a power given to appoint to an office has been once exercised, any subsequent appointment is void, unless the office has again become vacant.² But where an appointment is illegally made, as in a case where county commissioners appointed a county treasurer by drawing lots, they may make another appointment in the legal mode, which will be valid.³ Where a city charter provided that the common council should appoint a prosecuting attorney in joint convention, but gave no directions as to the mode of appointing him, and conferred upon the council no power of removal; and upon a ballot being taken for a prosecuting attorney, the relator had a majority of all the votes cast, and the result was announced by the presiding officer; whereupon a member offered a resolution declaring the relator to be elected, which was lost; and two other resolutions were then passed, one declaring the ballot taken to be void, by reason of errors (which in fact did not exist), the other declaring the defendant to be “elected and appointed prosecuting attorney;” it was held that the relator had been duly appointed; that no resolution declaring him appointed was necessary; and that the two resolutions actually passed were void.⁴

§ 91. **Validity of prospective or conditional appointment.**—As a general rule, a prospective appointment, made by a body, which, as then constituted, has power to fill the vacancy when it arises, is valid.⁵ So an

¹ *Johnston v Wilson*, 2 N. H. 202.

² *Thomas v Burrus*, 23 Miss. 550;
People v Woodruff, 32 N. Y. 355.

See also *State v Peelle*, 124 Ind. 515.

³ *Comm. v Phil'a Com'rs*, 5 Binn. (Pa.) 534.
See, however, *State v Peelle*, 124 Ind. 515.

⁴ *State v Barbour*, 53 Conn. 76.

⁵ *Whitney v Van Buskirk*, 40 N. J. L. 463.

appointment, to take effect at a future day, when the statute creating the office shall take effect, is good.¹ So where an officer resigns his office, the resignation to take effect at a future day, a new officer may be appointed before the time specified in the resignation.² Where county commissioners appointed A to be the county treasurer, provided that he gave a bond within two days, and he gave a bond three days afterwards, which was accepted and approved by the commissioners, it was held that the appointment was valid.³

§ 92. **Appointments by outgoing officers.**—But it has been held that where an office is to be filled by appointment by the governor, with the advice and consent of the senate, the governor and senate cannot forestal their successors, by appointing a person to an office which is then filled by another, whose term will not expire until after the expiration of the terms of the governor and senators.⁴ And that an out-going board of freeholders of a county, cannot lawfully appoint a person to an office which will not become vacant during their official terms.⁵

§ 93. **Appointment made “at” expiration of incumbent’s term or after statutory time.**—Where authority is given to appoint a successor “at” the expiration of an officer’s official term, the appointment may be lawfully made at or near the time when the term expires.⁶ And where a statute, providing for taking the census, directs the governor, “at least six months” before the commencement of the taking of the census, to appoint a superintendent of census, an appointment made within six months before the taking of the census is begun, is valid.⁷

¹ *State v Irwin*, 5 Neva. 111.

² *Smith v Dyer*, 1 Call (Va.) 562.

³ *State v Ring*, 29 Minn. 78, at p. 83.

⁴ *Ivy v Lusk*, 11 La. Ann. 486.

⁵ *State v Meehan*, 45 N. J. L. 189.

⁶ *People v Blanding*, 63 Cala. 333.

⁷ *In re Census Superintendent*, 15 R. I. 614.

See also, *People v Police Board*, 46 Hun (N. Y.) 296.

§ 94. **Mala fide and clandestine appointments, or by vote of one whose term has expired.**—Where a statute vested the appointing power in the mayor and two aldermen of a city, and two justices of the peace of the county, and directed that it should be exercised on a certain day; and the appointment was made clandestinely, after a refusal by the mayor to inform certain aldermen and justices of the peace, as to the hour when and the place where the appointment would be made; it was held, that this was not such an exercise of the mayor's discretion as would satisfy the law; and leave was granted to file an information in the nature of a quo warranto against the officers so appointed.¹ Where a county commissioner, whose term expired at midnight of a specified day, and whose successor had been duly elected and had qualified, participated the next day in a meeting of the board, and by his vote an appointment of a county treasurer was made, it was held that the appointment was void.²

II. Validity and effect of statutes, requiring appointments to be made after examination by, and upon the recommendation of, a civil service commission; or giving preference with respect to appointments to honorably discharged soldiers or sailors.

§ 95. **When such statutes are or are not constitutional.**—Statutes of the former character have been enacted by the congress of the United States, and statutes of both characters by many of the states. Statutes which require an applicant for office to comply with the civil service rules, are not obnoxious to the constitutional prohibition against imposing any test, except as specified in the constitution, as a condition of the right to hold office.³ And a statute providing that regulations for the admis-

¹ *Comm. v Douglas*, 1 Binn. (Pa.) 77.

² *People v Reid*, 11 Colo. 141.

³ *Rogers v Buffalo*, 123 N. Y. 173;

In re Wortman, 22 Abb. N. C. (N.Y.) 137.

See also *Peck v Rochester*, 3 N.Y. Supp. 872.

sion into the civil service of a city shall be established by the mayor, but shall be approved by the state civil service commission, before they shall go into effect, does not violate a constitutional provision, requiring that all municipal offices, not elective, shall be appointed by certain local authorities.¹ But it has been held, that the provision of the constitution of New York, conferring upon the superintendent of public works of the state, the power to select and appoint his subordinates, gives him exclusive power and discretion in the matter of all such appointments, and that the civil service statute of the state, as far as it attempts to encroach upon such power, is unconstitutional.² Also that the provision of the constitution of the same state, which confers upon the superintendent of prisons the power to appoint an agent for each of the prisons of the state, and upon each agent the power to appoint the subordinate officers of the prison, subject to the approval of the superintendent, renders unconstitutional the statutes giving preferences to discharged soldiers and sailors, as far as they apply to officers of the prisons.³

§ 96. **When not unconstitutional, how enforced.**—In cases which are not obnoxious to any constitutional prohibition, the courts will enforce such statutes, as the necessity arises, and in the mode prescribed by law for other similar cases. Thus it has been held, that under the statute of New York, giving preference to discharged soldiers and sailors, the mayor of a city has no discretion to refuse to appoint one having the requisite qualifications, if he is competent, and has complied with the law; and a mandamus will issue⁴ to compel him to make the

¹ *Rogers v Buffalo*, 123 N. Y. 173.

² *People v Angle*, 109 N. Y. 564, aff'g 47 Hun (N. Y.) 183.

³ *People v Durston*, 3 N. Y. Supp. 522.

⁴ *People v Bardin*, 7 N. Y. Supp. 123.

For other cases, where compliance

with these statutes has been enforced by mandamus, see *People v Knapp*, 4 N. Y. Supp. 825; 22 N. Y. State Reporter, 468;

People v Adams, 53 Hun (N. Y.) 141;

In re Sullivan, 55 Hun (N. Y.) 285.

appointment. And where a clerk in a city assessor's office was appointed without a civil service examination, in violation of the statutes relating thereto, it was held that payment of his salary could not be enforced, although the assessors were officers acting under official bonds.¹ Where the common council of a city refuses to make the appropriation necessary to pay an officer appointed by the mayor, pursuant to the statute, for the purpose of carrying out the provisions respecting the civil service examination, the officer may maintain an action against the city to recover a reasonable compensation for his services.²

§ 97. **Preferences to veterans.**—Under the New York statute of 1884, it was held that a veteran soldier or sailor has not an absolute right of preference, although he is qualified, but only a preference over others of equal standing.³ And an indictment for failing to comply with the statute will not lie, unless the prosecutor furnished evidence to the defendant that he was a veteran and otherwise within the statute.⁴ Under the Massachusetts statute of 1887, veteran soldiers or sailors cannot be preferred for appointments, without having applied to the civil service commissioners, and obtained their certificates, as prescribed by the civil service statute of 1884.⁵ Under the New York statute of 1886, providing that a veteran soldier or sailor shall not be disqualified from holding any office, on account of age or physical disability, if he remains competent to perform the duties, a veteran, who is a policeman, cannot be retired because he has reached the age of sixty, under a former statute providing for retiring a policeman who has reached that age.⁶

¹ *In re Gaffney*, 20 N. Y. State Reporter 165; 3 N. Y. Supp. 664.

² *Kip v Buffalo*, 123 N. Y. 152.

³ *People v Moore*, 39 Hun (N. Y.) 478.

People v Poillon, 16 Abb. N. C. (N. Y.) 119;

People v Saratoga Springs, 54 Hun (N. Y.) 16.

⁴ *People v Wallace*, 55 Hun (N. Y.) 149.

⁵ *Op'n of the Justices*, 145 Mass. 587.

⁶ *People v French*, 52 Hun (N. Y.) 464.

§ 98. **Construction of preferential statutes and rulings thereunder.**—The statutes of New York, giving preferences to discharged soldiers and sailors with respect to filling public offices are confined to original appointments, as distinguished from promotions, and consequently do not apply to promotions of members of the police force.¹ And where a discharged soldier applied for a mandamus to compel his appointment to an office which had been filled by the appointment of a civilian, the mandamus was refused, partly because the relator had no better right than other discharged soldiers, and partly because, as the office was already filled, the defendant had no longer the power to appoint the relator.² Where an office is abolished for reasons of economy, and the duties thereof are transferred to another officer, a discharged veteran who holds the abolished office, is not entitled to insist, under those statutes, that he shall not be discharged, and that the other office shall be transferred to him.³

III. Cases where an appointment to a public office is made upon the nomination of one officer, and the confirmation or consent of other officers.

§ 99. **Most common instances where governor appoints and senate confirms.**—Some cases of this description have been incidentally cited in the foregoing portion of this

¹ *In re McGuire*, 50 Hun (N. Y.) 203.

² *People v Wendell*, 57 Hun (N. Y.) 362.

³ *People v Adams*, 51 Hun (N. Y.) 583.

For other rulings as to the application of the New York statutes relating to the civil service commission, and to discharged veterans, to particular offices or in particular cases, see the following cases, all of which were decided in the courts of New York:

People v Civil Service Com'rs, 17 Abb. N. C. 64; 3 How. Pr. N. S. 40; *aff'd* 41 Hun 287;

People v French, 51 Hun 345; 20 N. Y. St. Rep. 928; 4 N. Y. Supp. 330;

People v French, 11 N. Y. St. Rep. 520; *Rogers v Buffalo*, 2 N. Y. Supp. 326; 22 Abb. N. C. 144;

People v Knapp, 22 N. Y. St. Rep. 468; 4 N. Y. Supp. 825;

Gaffney v Becker, 20 N. Y. St. Rep. 165; 3 N. Y. Supp. 664;

Peck v Rochester, 18 N. Y. St. Rep. 244; 3 N. Y. Supp. 872;

Peck v Belknap, 55 Hun 91;

In re Sullivan, 55 Hun 285;

People v Wallace, 55 Hun 149.

chapter.¹ The most common instances of this mode of appointment are where the constitution or a statute provides for the appointment of an officer, upon the nomination of the executive, by and with the advice and consent of the senate, or upon the nomination of the mayor of a city, and the consent of one or both branches of the municipal legislature.²

§ 100. **The Governor and the Senate.**—The constitution of the State of New York authorizes the governor to fill temporarily a vacancy in the office of justice of the supreme court, by the advice and consent of the senate, “if the senate shall be in session, or, if not in session,” by his own appointment. In 1872, upon the final adjournment of the regular annual legislative session, the governor convened the senate in extraordinary session. The extraordinary session, after sitting several days, adjourned from July 2 to September 10, and on the latter day met and adjourned to November 20. On the 13th of September, a vacancy occurred in the office of justice of the supreme court, which the governor filled on the 21st of September. The court of appeals held that the appointment was valid; that the words “in session,” as used in the constitution, “indicate a present acting or being of the senate as a body;” that the question, whether “while the session substantially continues, adjourned from day to day, or over holidays, or with brief and usual recesses, so that the session is practically continuous, the body might possibly be regarded as practically in session during such recesses,” did not arise; but that “when the sittings are terminated by an adjournment for months,” it cannot be said that the body is in session. The court also suggested, but declined to pass upon, the question whether the provision extends to any but the regular

¹ *Ante*, §§ 86, 88, 92.

² Many authorities, relating to this

method of appointment, are collected in ch. 18, *post*.

annual sessions of the senate, as a branch of the legislature.¹ Where it is provided by statute or the constitution that an officer holds over until his successor is chosen and qualifies, and that a person appointed to fill a vacancy holds until the senate confirms his appointment, the governor, after appointing a person to fill a vacancy cannot revoke the appointment, but must submit it to the senate for confirmation.² The governor, where the constitution authorizes him to fill a vacancy during the recess of the senate, may then fill a vacancy which occurred during the session.³ Where the constitution of a state provides that all "civil officers, appointed by the governor and senate, shall be nominated to the senate within fifty days from the commencement of each regular session of the legislature," this provision applies only where the office was created before the commencement of the session, not where it was created by a statute passed during the session.⁴ One appointed to an office by the president of the United States, when the senate was not in session, who entered upon the duties of his office, and served until notified that the senate had rejected his nomination, must be deemed to have been legally appointed, and entitled to the office while he served.⁵

§ 101. **The mayor and common council.**—In a case decided by the New York court of appeals, the charter of a city empowered the mayor, in case of a vacancy in the office of chamberlain, to nominate, and, upon the confirmation of the common council to appoint, a person for the full term of three years; and also to appoint in like manner, a person to act temporarily during the absence of the incumbent. The chamberlain, having yet eight months to serve, became a defaulter, and fled from the

¹ *People v Fancher*, 50 N. Y. 288.

⁴ *Co. Com'rs v Hellen*, 72 Md. 603.

² *People v Cazneau*, 20 Cal. 504.

⁵ *Gould v United States*, 19 Ct. of Cl. (U. S.) 593.

³ *State v Kuhl*, 51 N. J. L. 191.

city, without intention to return, whereupon the mayor nominated a person to discharge the duties of the office during the chamberlain's absence. It was contended, in behalf of the person so appointed, that by the chamberlain's flight, without any intention to return, the office became vacant, under a provision of the statute vacating a city office when the incumbent ceased to be a resident of the city; and consequently that the mayor had power only to fill the vacancy for a full term, so that the appointment must be deemed to have that effect. But the court held, that as the mayor had not attempted to fill the vacancy, but only to make a temporary appointment, the effect of the appointment could not be changed against his intention in making it; so that if he had no power to make the appointment which was in fact made, the result was that it was a nullity.¹ But where, by the correct construction of a city charter, the term of a city officer was fixed at two years, and the common council was empowered to appoint him; and the common council passed a resolution appointing a person to the office, and specifying that the appointment was for one year (that being supposed to be the lawful term), it was held that the appointment was valid for the full statutory period, and that the action of the common council in appointing another person to the office at the expiration of a year, was a nullity.²

§ 102. **Person nominated must have majority vote of confirming body.**—Where a statute provides that in the appointment of city officers, “the mayor shall have the exclusive power of nomination, subject however to confirmation or rejection by the board of aldermen,” a person nominated can be confirmed only by actually receiving the votes of a majority of the aldermen voting

¹ *People v Hall*, 104 N. Y. 170.

² *Stadler v Detroit*, 13 Mich. 346.

See also *People v Lord*, 9 Mich. 227.

upon the question; and if a person, nominated to office by the mayor, is not thus confirmed, the appointment is not duly made, and the appointee will be ousted upon quo warranto, although the mayor announced, at the time, without objection by any of the aldermen, that the nominee was confirmed, and the aldermen approved his bond, after he had taken the oath of office.¹

§ 103. **Rule in case district is not specified.**—Where a city had been divided into two inspection districts, so that there were but two inspectors to be appointed, one for the first and one for the second district, and the mayor nominated to the board of aldermen four persons to be inspectors, without designating any districts, it was held that the nomination was valid. And, each nomination having been considered separately by the board of aldermen, and confirmed, it was held that the relator, whose nomination was first acted upon, was duly appointed inspector of the first district; and a subsequent nomination of another for inspector of that district, and his confirmation by the board of aldermen, were a nullity.² So, also, where the three commissioners of highways of a town had been classified according to their terms of office, and the commissioners of the first and third classes failed to qualify, and the vacancies were filled by the justices of the peace of the town, by the appointment of “J. S. S. and J. M. to the office of commissioners of highways,” without any designation of classes, it was held that J. S. S. was duly appointed to fill the vacancy in the first class.³

¹ *Comm. v Allen*, 128 Mass. 308.

In this case the mayor, after the nomination of one person had been rejected ten times, again nominated the same person, and put the question in this form: “Shall the nomination be rejected?” and, the vote being three in the affirmative, and

three in the negative, declared the nomination not rejected, and the nominee appointed.

See also *Baker v Com'rs*, 62 Mich. 327.

² *People v Kneissel*, 58 How. Pr. (N. Y.) 404.

³ *People v Supervisors*, 20 N. Y. 252.

IV. Appointment made by one or more boards of officers, or by the concurrent action of three or more separate officers.

§ 104. **The questions considered in this division.**—Many of the questions relating to this subject are difficult of solution, and the decisions of the courts thereupon are not always harmonious. Those which relate to an appointment by one or more boards of officers can be satisfactorily considered only by examining the authorities relating to the official action of such a board or boards, in other matters within their jurisdiction, as well as the specific matter of the appointment to public office; and our consideration of this subject will therefore extend to the general official action of such a board or boards. But the rulings relating to the action of boards of directors or trustees of private corporations, although to a considerable extent dependent upon the same principles, nevertheless are often governed by considerations inapplicable to the action of public bodies, and will therefore be excluded from our examination, except so far as it may be necessary to consider them incidentally, to elucidate the principles governing the action of public bodies. With respect to the concurrent action of separate public officers, we will confine ourselves to cases where three or more are required to act, as the cases where one officer is empowered to act have been considered in the first division of this chapter; and those where the power is vested in two officers often present special questions, which will be considered in a subsequent chapter.¹ We have found it necessary to cite some of the cases, relating to the particular subject now to be examined, in preceding pages of this chapter, and to avoid repetition we will merely refer to them here.²

¹ *Post*, ch. 25.

² *Ante*, §§ 83, 87, 89 to 94.

§ 105. **The English rule as to when act of majority concludes minority.**—It has been settled, by a long series of adjudications, that where a power to act, in a matter of merely private trust, is given to two or more persons, the concurrence of all the persons empowered is requisite to the valid execution of the power, in the absence of any directions in the instrument, authorizing a less number to act. But the common law recognizes a distinction, which has been embodied in the statutes of most of the states of the Union, between the execution of such a power, and of a power pertaining to the administration of public affairs. Where six persons had been appointed pursuant to an act of parliament, as “searchers” to determine as to the quality of certain tanned hides, and four condemned the hides, and the other two refused to do so, it was held, by the opinions of all the judges, that this was in legal effect the condemnation of the six. “I think it is now pretty well established,” said Eyre, Ch. J., “that where a number of persons are intrusted with powers, not of mere private confidence, but in some respects of a general nature, and all of them are regularly assembled, the majority will conclude the minority, and their act will be the act of the whole.”¹ And in England the same principle has been applied in other similar cases, where the matter was one of public concern.²

¹ Grindley v Barker, 1 Bos. & Pul. 229.

² Rex v Beeston, 3 T. R. (D. & E.) 592;
Withnell v Gartham, 6 T. R. (D. & E.)
388;

Cortis v Kent Waterworks Comp'y, 7
B. & C. 314;

Rex v Whitaker, 9 B. & C. 648.

The English courts have applied a rule of “singular strictness” to corporate acts, including those of municipal corporations, with respect to the separate concurrent action of each branch of the corporation, as essen-

tial to the validity of a corporate act. See *Ex parte Rogers* 7 Cow. (N.Y.) 528, note pp. 531, 534, citing and commenting upon the English authorities.

The American courts have not followed these rulings, at least with respect to municipal corporations, which are regarded here as part of our system of government, and the validity of the acts of which depend upon the same principles which govern those of other public bodies. On the other hand, the English rule, with respect to the number of mem-

§ 106. **American cases following English rule.**—These rulings in the English courts have been followed, and the principle thereof extended, in the United States. The general rule, that where a statute confers upon three or more persons a power to act in a matter of public concern, requiring the exercise of discretion and judgment, and contains no directions respecting the number of those who may exercise the power, such exercise will not be valid, unless all act, or unless all meet for consultation and a majority act, has been established by many adjudications of the American courts.¹ And if there are

bers of each branch of a corporation, who can act, and the circumstances under which some of the members can act, in the absence of others, has been adopted here, and applied to all cases where a public body, consisting of three or more members, acts with respect to a matter of public concern. See *post*, §§ 111 *et seq.*

- ¹ *Caldwell v Harrison*, 11 Ala. 755;
Pulaski County v Lincoln, 9 Ark. 320;
Louk v Woods, 15 Ill. 256;
Paola, etc., R. R. Comp'y v Anderson Co., 16 Kan. 302;
Merrill v Berkshire, 11 Pick. (Mass.) 268;
Williams v School Dist., 21 Pick. (Mass.) 75;
George v School District, 6 Met. (Mass.) 497;
Kingsbury v School Dist., 12 Met. (Mass.) 99;
Reed v Scituate, 5 Allen (Mass.) 120;
Plymouth v Plymouth County, 16 Gray (Mass.) 341;
State v Porter, 113 Ind. 79;
Scott v Detroit Y. M. Soc., 1 Dougl. (Mich.) 119;
State v Smith, 22 Minn. 218;
State v Guiney, 26 Minn. 313;
Jewett v Alton, 7 N. H. 253;

- Dispatch Line v Bellamy Man. Comp'y*, 12 N. H. 205;
Glidden v Towle, 31 N. H., 147;
Charles v Hoboken, 27 N. J. L. 203;
Green v Miller, 6 Johns. (N. Y.) 39;
Spicer v Slade, 9 Johns. (N. Y.) 359;
Palmer v Doney, 2 Johns. Cas. (N. Y.) 346;
Babcock v Lamb, 1 Cow. (N. Y.) 238;
Ex parte Rogers, 7 Cow. (N. Y.) 526;
McCoy v Curtice, 9 Wend. (N. Y.) 17;
Field v Field, 9 Wend. (N. Y.) 394;
Crocker v Crane, 21 Wend. (N. Y.) 211;
Downing v Rugar, 21 Wend. (N. Y.) 178;
Woolsey v Tompkins, 23 Wend. (N. Y.) 324;
Whiteside v People, 26 Wend. (N. Y.) 635;
People v Supervisors, 1 Hill (N. Y.) 195;
Lee v Parry, 4 Denio (N. Y.) 125;
Harris v Whitney, 6 How. Pr. (N. Y.) 175;
Whitford v Scott, 14 How. Pr. (N. Y.) 302;
In re Beekman's petition, 31 How. Pr. (N. Y.) 16; 1 Abb. Pr. N. S. (N. Y.) 449;
People v Sup'rs, 10 Abb. Pr. (N. Y.) 233;
 18 How. Pr. (N. Y.) 152; *aff'd* 21 How. Pr. (N. Y.) 288.
Gildersleeve v Board of Education, 17 Abb. Pr. (N. Y.) 201;
Parrott v Knickerbocker Ice Comp'y, 8 Abb. Pr. N. S. (N. Y.) 234;
Perry v Tynen, 22 Barb. (N. Y.) 137;

any vacancies in the board, it has been said that the members in office cannot act, although they would constitute a majority of the full board.¹

§ 107. **When minority cannot prevent action of majority; subsequent ratification.**—Where all have been duly convened, the dissent of the minority, and even their withdrawal and refusal to be considered members of the board, will not affect the validity of the act of the majority.² But if two of three act, without the presence of or notice to the third, his subsequent assent to their act, and affixing his signature to the instrument executed by them, does not cure the defect, for the law of principal and agent does not apply to this subject.³ And it has been

Keeler v Frost, 22 Barb. (N. Y.) 400;
Horton v Garrison, 23 Barb. (N. Y.) 176;
People v Walker, 23 Barb. (N. Y.) 304;
2 Abb. Pr. (N. Y.) 421;
Schuyler v Marsh, 37 Barb. (N. Y.) 350;
White v Lester, 1 Keyes (N. Y.) 316;
Lamoureux v O'Rourke, 2 Keyes
(N. Y.) 499;
Doughty v Hope, 1 N. Y. 79, aff'g 3
Denio (N. Y.) 249, 594;
Powell v Tuttle, 3 N. Y. 396;
Olmsted v Elder, 5 N. Y. 144;
People v Sup'rs, 11 N. Y. 563;
Cruger v Hudson River R. R. Co., 12 N.
Y. 190;
Pell v Ulmar, 18 N. Y. 139;
People v Batchelor, 22 N. Y. 128, aff'g
23 Barb. (N. Y.) 310;
Board of Excise v Sackrider, 35 N. Y.
154, at p. 158;
People v Williams, 36 N. Y. 441;
Water Com'rs v Lansing, 45 N. Y. 19;
People v Nichols, 52 N. Y. 478;
Johnson v Dodd, 53 N. Y. 76;
Austin v Helms, 65 N. C. 560;
State v Wilkesville, 20 Ohio St. 288;
In re Baltimore Turnpike, 5 Binn. (Pa.)
481;
Cooper v Lampeter, 8 Watts (Pa.) 125;

Comm. v Canal Com'rs, 9 Watts (Pa.)
466;
County Com'rs v Lecky, 6 S. & R. (Pa.)
166;
In re Paradise Road, 29 Pa. St. 20;
Jefferson County v Slagle, 66 Pa. St. 202;
Nason v Poor Directors, 126 Pa. St. 445;
Cassin v Zavalla, 70 Tex. 419;
Schenck v Peay, 1 Woolw. (U. S.) 175;
Curtis v Butler, 24 How. (U. S.) 435;
Cooley v O'Connor, 12 Wall. (U. S.) 391;
First Nat'l Bank v Mount Tabor, 52 Vt.
87;
Soens v Racine, 10 Wis. 271.

¹ Cassin v Zavalla, 70 Tex. 419.
See also Williamsburg v Lord, 51 Me.
599;
Schenck v Peay, 1 Woolw. (U. S.) 175.

² Cases cited in note (1) p. 111; especially
Palmer v Doney, 2 Johns. Cas. (N. Y.)
346;
Whiteside v People, 26 Wend. (N. Y.)
634;
Ex parte Rogers, 7 Cow. (N. Y.) 526;
People v Supervisors, 1 Hill (N. Y.) 195;
Water Com'rs v Lansing, 45 N. Y. 19;
People v Nichols, 52 N. Y. 478.
³ See also Billings v Stark, 15 Fla. 297.

⁴ Keeler v Frost, 22 Barb. (N. Y.) 400.

held that the approval by the full board of the minutes of the meeting where the two only acted, will not cure the defect.¹ But if, at a subsequent full meeting, the invalid act is ratified and adopted, that renders the act valid, for the powers of the board were not exhausted by the invalid action.²

§ 108. **Presumption of validity.**—However, the presumption is always in favor of the validity of the act; so that if the instrument executed, or other official act, is executed by a majority only, it will be presumed that all met for consultation, unless the contrary expressly appears upon the face thereof: and where nothing to impeach it appears upon the face thereof, the fact that the minority did not participate in the proceedings must be affirmatively shown by a party seeking to impeach it.³ But under a statute allowing two of three officers to act, provided that the order shows upon its face that all “met and deliberated upon the subject embraced in such order, or were notified to attend a meeting of the commissioners for the purpose of deliberating thereon,” an order signed by two will not be valid, which recites that the third, “being duly notified did not attend,” because it does not state the purpose of the notice; and the same result will follow when the order recites that “all the commissioners were notified and in attendance.” And where the order thus fails to conform fully to the provisions of the statute, its defects cannot be cured by reference to the general statute regulating the power of a majority to act,

¹ *In re Palmer*, 1 Abb. Pr. N. S. (N. Y.) 30.

² *In re Pearsall*, 9 Abb. Pr. N. S. (N. Y.) 203.

³ *Louk v Woods*, 15 Ill. 256;
Torr v State, 115 Ind. 188;
Scott v Detroit Y. M. Soc., 1 Dougl. (Mich.) 119;
State v Smith, 22 Minn. 218;

McCoy v Curtice, 9 Wend. (N. Y.) 17;
Downing v Ruger, 21 Wend. (N. Y.) 178;
Keeler v Frost, 22 Barb. (N. Y.) 400;
Doughty v Hope, 3 Denio (N. Y.) 249;
aff'd 1 N. Y. 79;
People v Bradley, 64 Barb. (N. Y.) 228;
In re Merriam, 84 N. Y. 596.

or by oral evidence that the third commissioner did in fact meet with his colleagues.¹

§ 109. Rule has been extended to private transactions.—As the rule has been stated in the preceding sections, it seems to be confined to matters of public concern, requiring the exercise of discretion and judgment; but the distinction has been disregarded in some cases.² In other cases it has been said generally that the majority may act, without a meeting of all, or notice to the minority to meet.³ But these cases seem to be opposed to the weight of authority.

§ 110. Rulings as to whether particular statutes affect the rule.—However, in order to enable a majority to act, without a meeting of all, or notice of such a meeting to the minority, it is not necessary that the statute should expressly confer such a power; it suffices that the power may be reasonably inferred from the provisions of the statute or the nature of the power conferred. And the same rule applies, *e converso*, to prevent the majority from acting without the concurrence of all.⁴ Where a statute expressly provides that a majority may act, they may act without consultation with the minority.⁵ Where appraisers are appointed by statute to act between individuals and the state, it is matter of “public concern,” and the majority may act, when all have met; and the contrary direction will not be inferred from the repetition of the conjunction

¹ *Fitch v Com'rs, etc.*, 22 Wend. (N. Y.) 132;

Stewart v Wallis, 30 Barb. (N. Y.) 344;
People v Hynds, 30 N. Y. 470; s. c., 27 Barb. (N. Y.) 94;

People v Williams, 36 N. Y. 441, overruling *Tucker v Rankin*, 15 Barb. (N. Y.) 471.

² See *People v Walker*, 23 Barb. (N. Y.) 304, and cases cited.

³ *Jefferson Co., v Slagle*, 66 Pa. St. 202;

Austin v Helms, 65 N. C. 560;

Wolcott v Wolcott, 19 Vt. 37.

⁴ *Pulaski Co., v Lincoln*, 9 Ark. 320;
State v Wilkesville, 20 Ohio St. 288;
People v Nichols, 52 N. Y. 478;
Keeler v Frost, 22 Barb. (N. Y.) 400;
Schuyler v Marsh, 37 Barb. (N. Y.) 350;
People v Williams, 36 N. Y. 441.

⁵ *Johnson v Dodd*, 56 N. Y. 76.

See also, *People v Batchelor*, 22 N. Y. 123.

“and” between each of the names after the first, or from the name of the dissenting appraiser being first stated, or from the use of the word “their” in describing the opinion of the appraisers, or the certificate to be given.¹ Where the statute, expressly or by necessary implication, requires all or a certain number to act, the act of a smaller number is of no more legal validity than the act of the same number of private individuals;² and in such a case the act is not valid, if it is begun when the requisite number is present, and the minority departs, although wrongfully, before its consummation.

§ 111. **Requirement that all shall meet; substitution of notice for presence.**—Obviously a rule, which requires all the members of a body exercising powers of a public nature, to meet, before the majority can perform any valid official act, must often lead to delay and inefficiency in the transaction of the public business. This inconvenience is often obviated by a statutory provision enabling a majority to act; and with reference to corporations, including municipal corporations, the English authorities relax the strictness of the rule, by allowing a quorum or a majority of the whole number of the governing body, to act at the stated meeting of the body, where all are bound to attend, or at a special meeting of which all have had notice. In the case formerly cited, wherein the general rule was laid down, that all the persons empowered must meet, the lord chief justice added, that the cases of corporations go further; there it is not necessary that all should meet; it suffices if notice to all be given; and thereupon a majority, or a lesser number, according as the charter may be, may meet; and when they have met, they become just as competent to decide as if all had met.⁴ In a previous case, it had been said: “It cannot

¹ *People v Nichols*, 52 N. Y. 478.

³ *Ex parte Rogers*, 7 Cow. (N. Y.) 526.

² *Parsons v Pettingell*, 11 Allen (Mass.) 507.

⁴ *Grindlay v Barker*, 1 Bos. & Pul. 229, per Eyre, Ch. J., p. 236.

be disputed that wherever a certain number are incorporated, a major part of them may do any corporate act; so if all are summoned and part appear, a major part of those that appear may do a corporate act, though nothing be mentioned in the charter of the major part.”¹

§ 112. **American authorities relating to non-attendance after notice.**—This principle has been applied by some of the American authorities, particularly in the state of New York, to the acts of public officers, and other persons exercising powers of a public nature, where there is no statutory provision in the way of such application, and even where the common law rule, as declared by the English courts, has been substantially embodied into a statute. In the earliest case where this modification of the common law rule was suggested, the court, referring to the three trustees of a school district, said: “There can be no doubt that . . . two could contract against the will of the third, if he was duly notified or consulted, and refused to act.”² And in a subsequent case in the same state, referring to the same officers, it was said: “The rule of the common law, which is now declared by statute, that where an authority is to be exercised by more than one officer, they must all concur in its exercise, or all meet and consult and a majority agree to the act, is subject to the necessary qualification, that if one is notified to attend and refuses, it is the same as if he had attended and dissented from the act.”³ And this rule is now well recognized by the courts of New York,⁴

¹ *Att’y Gen. v Davy*, 2 Atk. 212.
See also *Rex v Miller*, 6 T. R. (D. & E.) 269;
Blackett v Blizzard, 9 B. & C., 851;
Rex v Langhorne, 6 N. & M. 203; 4 A. & E. 538.

² *McCoy v Curtice*, 9 Wend. (N. Y.) 17,
per Sutherland, J., p. 19.

³ *Horton v Garrison*, 23 Barb. (N. Y.) 176,
per Emott, J., p. 179.

⁴ *Woolsey v Tompkins*, 23 Wend. (N. Y.) 324;
Perry v Tynan, 22 Barb. (N. Y.) 137;
People v Walker, 23 Barb. (N. Y.) 304;
2 Abb. Pr. (N. Y.) 421;
In re Church Street, 49 Barb. (N. Y.) 455;

and by some of the courts elsewhere;¹ and it commends itself for universal adoption, by its reasonableness, and its tendency to avoid impediments to the transaction of public business.

§ 113. **Sufficiency of notice; effect of participation.**—As to the sufficiency of the notice required, in order to enable the majority to act in the absence of the minority, it seems that a reasonable notice suffices; and whether a notice is or is not reasonable, will depend upon the circumstances of each particular case.² Where a member of a county board objected to the validity of a special meeting, on the ground of a defective notice thereof, it was held that by attending at and participating in the meeting, he waived all defects in the notice.³

§ 114. **Stated and statutory meetings.**—Where a body has established rules or by-laws, fixing the times and places of its stated meetings, all the members are deemed to have notice of such stated meetings, and an appointment may be made at such a meeting, without special notice to the absentees.⁴ But where the board of aldermen of a city appointed a day for the choosing of a city officer, and at an intervening stated meeting rescinded the

People v Supervisors, 10 Abb. Pr. (N. Y.) 233; 18 How. Pr. (N. Y.) 152; aff'd 21 How. Pr. (N. Y.) 238:

Gildersleeve v Board of Education, 17 Abb. Pr. (N. Y.) 201, per Daly, F. J. p. 211; *People v Batchelor*, 22 N. Y., 128; aff'g 28 Barb. (N. Y.) 310;

People v Nichols, 52 N. Y., 478.

The New York statute on this subject was amended in 1874, so as to incorporate this rule into it, and to allow a majority to act, where one or more shall have died, etc. See 4 N. Y. R. S. (8th ed.) 2726.

¹ *Williams v School District*, 21 Pick. (Mass.) 75, per Shaw, Ch. J. p. 82; *State v Guiney*, 26 Minn. 313;

Schenck v Peay, 1 Woolw. (U. S.) 175, per Miller, J. p. 187.

See also *People v Harrington*, 63 Cal. 257; *Walker v Rogan*, 1 Wis. 597.

² *Whiteside v People*, 26 Wend. (N. Y.) 634, rev'g, p. r., 23 Wend. (N. Y.) 9. See, also *People v Walker*, 23 Barb. (N. Y.) 304;

People v Batchelor, 28 Barb. (N. Y.) 310; aff'd 22 N. Y. 128; *In re Church Street*, 49 Barb. (N. Y.) 455.

³ *Mitchell v Horton*, 75 Iowa 271.

⁴ *Gildersleeve v Board of Education*, 17 Abb. Pr. (N. Y.) 201, at p. 208; *People v Batchelor*, 22 N. Y. 128, aff'g 28 Barb. (N. Y.) 310.

resolution, and determined to proceed immediately to the selection, some of the aldermen being absent and having had no notice of the change; it was held that the appointment was void.¹ Where the day of the meeting of the mayor, aldermen, and city council for the election of city officers is fixed by statute, one half of the aldermen cannot defeat an election by absenting themselves, so as to leave that board without a quorum. They are bound to be present at all times when the board is in session, till the election is made, and if a recess or adjournment is taken, they are bound to take notice of the time of meeting.² But where a statute empowered and directed the township trustees of a county to meet on a day specified, and appoint a county superintendent, but gave no direction as to the number requisite to form a quorum or the manner of election; and the township trustees, ten in number, met at the appointed day, and, after balloting unsuccessfully until noon, adjourned to a fixed hour of the next day; and only five attended at the adjourned meeting, who appointed a person county superintendent; it was held that the common law rule requires the presence of a majority to render an appointment valid, and that therefore the appointment was void.³ Where town officers, on the day fixed by statute, met and appointed A town treasurer, and then adjourned to a day certain to enable him to accept or decline the appointment; and on that day he appeared and declined, whereupon they adjourned to another day certain, and on that day appointed B; it was held that B was lawfully appointed, and that the former incumbent did not hold over.⁴

§ 115. **Doctrine extended to jury to appraise damages.**—The constitution of New York provides that “when private property shall be taken for any public use, the

¹ *People v Batchelor*, 22 N. Y. 128.

² *State v Porter*, 113 Ind. 79.

³ *Kimball v Marshall*, 44 N. H. 465.

⁴ *Carter v McFarland*, 75 Iowa 196

compensation to be made therefor, when such compensation is not made by the state, shall be ascertained by a jury, or by not less than three commissioners appointed by a court of record, as shall be prescribed by law." It has been held that the appraisal of property thus taken, by two of three commissioners, at a meeting of all, the third dissenting, is valid, and not prohibited by the constitutional provision;¹ and that where a jury of twelve men has been appointed, the same rule applies, so that a majority may decide under the same circumstances.²

§ 116. **Rules relating to appointments made by two or more separate bodies.**—Where the power of appointment to an office is conferred by statute upon two or more bodies, and no provision for a quorum is made, nor is it provided that they shall act separately, the rule is that all the members of all the bodies must meet together for consultation, or all must be notified so to meet; and thereupon if the majority of those present constitute a majority of all the members of all the bodies, they may proceed to make the appointment.³ But even where the law requires a joint ballot, an appointment by the separate ballot of each body is at least sufficient to give color of title to the office.⁴

§ 117. **The same subject.**—Where a power to appoint is given by statute to two bodies, with a provision that if they disagree in their nominations, they shall meet, and the appointment shall be made by joint ballot, if one body nominates, and the other refuses to nominate,

¹ *In re Broadway widening*, 63 Barb. (N. Y.) 572.

See also, *In re Church Street*, 49 Barb. (N. Y.) 455.

² *Cruger v Hudson R. R. Co.* 12 N. Y. 190.

³ *People v Walker*, 23 Barb. (N. Y.) 304; 2 Abb. Pr. (N. Y.) 421;

Gildersleeve v Board of Education, 17

Abb. Pr. (N. Y.) 201;

Comm. v Hargest, 7 Pa. County Court, 333.

See also, *Davenport v Hull*, 18 Wend. (N. Y.) 510;

Canniff v Mayor, etc. 4 E. D. Smith. (N. Y.) 430.

⁴ *Belfast v Morrill*, 65 Me. 580.

the effect is the same as if the nominations did not agree, and the appointment must be made by joint ballot.¹ And, under the same statute, where the two bodies met, pursuant to an invitation from one body to meet for the purpose of making a particular appointment; and, one body being much more numerous than the other, it was resolved by a majority of the whole number to proceed to make the appointment, whereupon the smaller body refused to act upon the question of the appointment, and all the members thereof left the room; and a majority of the members of the other body, who constituted a majority of the joint meeting, proceeded to make the appointment; it was held that the appointment was valid.²

§ 118. **Rule when majority or officer refuses to obey statute.**—Where a statute authorizes a county board to appoint a county treasurer, if at least eleven of the twenty members are present; and a majority of those so present either refuse to vote, or vote in a manner different from that prescribed by law, (as by voting *viva voce* where the law requires them to vote by ballot); a minority, composed even of a single member, is sufficient to make an appointment. The presence of a quorum of the members is not required to be proved by the legal votes actually given, but may be established by other proof, like any other fact in the case.³ Where a statute provides that the justices of the peace of a county shall meet on a specified day on the call of the county judge, and elect associate judges of the court of quarter sessions; that the county judge shall preside at, and the county clerk be clerk of, the meeting; and that the county judge and the county clerk shall execute the certificate of the election; the

¹ *Ex parte Humphrey*, 10 Wend. (N. Y.)

613. See, also, *Canniff v Mayor*, etc.,

4 E. D. Smith (N. Y.) 430.

634, rev'g p. r. 23 Wend. (N. Y.) 9.

See also, *Kimball v Marshall*, 44 N. H.

465.

² *Whiteside v People*, 26 Wend. (N. Y.)

³ *Comm. v Read*, 2 Ashm. (Pa.) 261.

presence of the county judge and of the county clerk is not essential to the validity of the proceedings; and if the county judge refuses to call the meeting, and the county clerk refuses to attend, the justices may meet on actual notice to all, and then, or at an adjourned day, may make a valid appointment.¹

§ 119. **Construction of votes where two separate bodies act.**—Where the ordinances of a city provided for the appointment of an officer, by the concurrent vote of both branches of the city government; and the board of aldermen refused to concur with the common council in the appointment of A; but at an adjourned meeting declared A elected to the office on its part; and notice of both votes was given to the common council, which non-concurred with A's appointment, and appointed B on its part, and notified the board of aldermen of both votes; whereupon that body concurred in B's appointment; it was held that A had not been appointed by a concurrent vote, and that the record of the clerk of the board of aldermen, stating that the vote of that body in its favor was in concurrence with the vote of the common council appointing him, was controlled by the whole record, which showed that the vote at the second meeting was independent.²

§ 120. **Whether power is judicial; when member of appointing body may not be appointed.**—It was said in one case in New York, that "the exercise of the power of appointment to office is a purely executive act;"³ but the learned judge who made that remark was arguing that it was not a legislative act. In other cases in the same state, it has been held that an appointment to office is a judicial act, and that if jurisdiction appears, it cannot be

¹ *People v Campbell*, 2 Cala. 135.

² *In re Achley*, 4 Abb. Pr. (N. Y.) 35, per Davies, J.

³ *Saunders v Lawrence*, 141 Mass. 380.

questioned collaterally.¹ And the principle, which prevents a person exercising judicial powers from having an interest in a question before him, has been extended to an appointment to an office by a body. Thus where a statute conferred upon any three of the justices of the peace of a town the power to appoint a town officer, and, the four justices of the town having met, three of them concurred in appointing one of their own number, the fourth refusing to concur and to sign the warrant; it was held that the appointment was not lawful, and that the former officer held over under the statute.²

§ 121. **Validity of action previously settled by "caucus" of majority.**—It was held that an agreement by certain members of a board of education, to purchase certain books for the schools, and to ratify the contract at a meeting of the board, was unlawful, on the ground that it was contrary to public policy for members of a board of officers, who ought to meet and discuss with their associates the questions upon which they are to vote, to agree beforehand how they will vote at a future meeting.³ But in another case, it was held that a preliminary meeting or "caucus" of the members of the common council of a city, constituting a majority of the body, at which a person was selected as the candidate for a city office, who was subsequently appointed at a regular meeting, did not invalidate the appointment, the case being distinguished from the one last cited, on the ground that the latter was an action on an executory agreement, whereas in this case the transaction was executed.⁴

¹ *Wood v Peake*, 8 Johns. (N. Y.) 69;
Wildy v Washburn, 16 Johns. (N. Y.) 49;
People v Seaman, 5 Denio (N. Y.) 409.

² *People v Thomas*, 33 Barb. (N. Y.) 287,
Accord, *Kinyon v Duchêne*, 21 Mich.
 498;

Comm. v Douglass, 1 Binn. (Pa.) 77;
State v Hoyt, 2 Oreg. 246.
 See also *post*, §§ 610-613.

³ *McCortle v Bates*, 29 Ohio St. 419.

⁴ *People v Stowell*, 9 Abb. N. C. (N. Y.)
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CHAPTER IX

ELECTION BY THE PEOPLE

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ance in our system of government. With a few exceptions, embodied in the constitution of the United States, the right of suffrage, the mode in which it is exercised, the eligibility of persons to office, and all other matters connected with elections, are regulated by each state, in accordance with its own ideas of convenience and public policy. The questions, which have arisen upon the constitutional and statutory provisions of the different states, relating to elections, are numerous, and have often proved to be difficult. To attempt to discuss them in detail is foreign to the plan of this work. We shall accordingly confine our remarks, in this chapter, to the consideration of a few general principles governing the subject.

I. Nature of and right to the elective franchise; and how it is conferred and regulated.

§ 123. **Right to vote a franchise; the people, as a political body.**—Participation in the choice of public officers by the people is not a right, but a franchise; and it is granted or denied at the pleasure of the state, on grounds of general policy, the prevailing rule being, in this country, that it should be as general as possible, consistently with the public safety and the public benefit.¹ Accordingly the right to vote may be granted or withheld at the pleasure of the state.² And in speaking of the people, as a body politic, as when we say that the sovereignty of the state is vested in the people, we speak only of those of the inhabitants, who are invested with political power; so that, for political purposes, the expressions “the people” and “the qualified voters” are synonymous.³

¹ Cooley Const. Lim., 5 ed., 752 (* 599.)

² Van Valkenburg v Brown, 43 Cal. 43;
Anderson v Baker, 23 Md. 531;
Blair v Ridgely, 41 Mo. 63;
People v Barber, 48 Hun (N. Y.) 198;
Huber v Reilly, 53 Pa. St. 112;

Minor v Happersett, 21 Wall. (U. S.)
162;
United States v Reese, 92 U. S. 214;
United States v Cruikshank, 92 U. S.
542;

³ Blair v Ridgely, 41 Mo. 63;
Cooley Const. Lim., 5 ed., 37 (* 28, * 29.)

§ 124. **Powers of congress and the states; effect of 14th and 15th amendments.**—Before the fifteenth amendment to the constitution of the United States, the power to regulate the elective franchise was under the exclusive control of the state in which it was to be exercised, subject to the exception, that under the constitution of the United States, a state could not prevent a person, who was qualified to vote for members of the lower house of the state legislature, from voting for representatives in congress: and congress had no power to legislate directly concerning the qualifications of voters, or otherwise to give or take away the right of suffrage.¹ But some comparatively recent cases have held that congress has an indirect power to affect the qualifications of voters; for since the state constitutions generally require that a voter should be a citizen of the United States, and congress has the power to regulate such citizenship, it has been ruled that an act of congress, enacted during the late civil war, declaring that any person deserting from the military or naval forces of the United States should forfeit his citizenship, has the effect to take away from such a deserter the right to vote under the state laws.² It has been decided by the supreme court of the United States, that the fourteenth amendment to the constitution of the United States, which prohibits any state from depriving any person of life, liberty, or property, without due process of law, or from denying to any person within its jurisdiction the equal protection of the laws, adds nothing to the right of one citizen against another, and

¹ *Huber v Reilly*, 53 Pa. St. 112. See also
Anderson v Baker, 23 Md. 531;
Kinneen v Wells, 144 Mass. 497;
Austin v State, 10 Mo. 591;
Blair v Ridgely, 41 Mo. 63;
Ridley v Sherbrook, 3 Coldw. (Tenn.)
 569;
State v Staten, 6 Coldw. (Tenn.) 233;

United States v Anthony, 11 Blatch.
 (U. S.) 200.

² *State v Symonds*, 57 Me. 148;
Huber v Reilly, 53 Pa. St. 112. See also
Gotcheus v Matheson, 58 Barb. (N.
 Y.) 152; 5 Lans. (N. Y.) 214, rev'd, on
 another ground, 61 N. Y. 420.

does not confer the right of suffrage upon any one. Nor does the fifteenth amendment, providing that the right of citizens of the United States to vote shall not be denied or abridged by the United States or by any state, on account of race, color, or previous condition of servitude, confer the right of suffrage upon any one; it merely prevents the states, or the United States, from giving a preference, with respect to that right, in favor of one citizen over another, on account of race, color, or previous condition of servitude; so that if the citizens of one race, having certain qualifications, are permitted by law to vote, those of another race, having the same qualifications, must also be allowed to vote.¹

§ 125. **The state executes its power through its constitution; unconstitutional statutes.**—The power of the state to regulate the elective franchise is exercised universally by means of provisions in the constitution of each state; and, under a familiar rule of constitutional law, any act of the legislature, which has the effect to withhold the elective franchise from any person to whom the constitution grants it, or to grant it to any person who does not possess the qualifications which the constitution requires, or to prescribe a mode for its exercise different from the mode prescribed in the constitution, is unconstitutional and void, and will be declared so to be by the courts.² That a person hereafter naturalized shall

¹ *United States v Reese*, 92 U. S. 214; *United States v Cruikshank*, 92 U. S. 542. See also *Minor v Happersett*, 21 Wall. (U. S.) 162;

Ex parte Yarbrough, 110 U. S. 651.

Accord, *Van Valkenburgh v Brown*, 43 Cal. 43.

A state has jurisdiction to punish illegal voting at an election for electors of president and vice-president of the United States. *In re Green*, 134 U. S. 377.

² *State v Adams*, 2 Stew. (Ala.) 231;

Rison v Farr, 24 Ark. 161;

Bourland v Hildreth, 26 Cal. 161;

Quinn v State, 35 Ind. 485;

Morris v Powell, 125 Ind. 281;

State v Symonds, 57 Me. 148;

Kinneen v Wells, 144 Mass. 497;

Twitchell v Blodgett, 13 Mich. 127;

St. Joseph, etc., R. R. Comp'y v Buchanan County Court, 39 Mo. 485;

not be entitled to vote within thirty days after his naturalization, is unconstitutional, as it imposes a condition not recognized in the constitution.¹ So is a statute requiring that a voter should have been a resident of the town, city or ward, for a certain length of time before the election, where the constitution does not contain such a restriction;² or prescribing a longer period for such residence than the constitution prescribes;³ or imposing a test oath which the constitution does not recognize.⁴ Other illustrations of this principle will be found in the cases cited in the first note to this section.

§ 126. **The same subject ; instances of valid statutes.**—But a statute superadding certain requirements, which are not inconsistent with the constitutional provisions, is valid. A striking illustration of this rule is found in the doctrine relating to the registration laws, presently to be considered.⁵ Thus a statute providing that each voter shall vote only in the district of his residence, is not inconsistent with a constitutional provision that a person, who has resided a certain length of time in the state and county, is entitled to vote, as the statute only fixes the place where he shall exercise his constitutional right.⁶

State v Corner, 22 Nebr. 265;
Davies v McKeeby, 5 Neva. 369;
Clayton v Harris, 7 Neva. 64;
Barker v People, 3 Cow. (N. Y.) 686;
People v Canaday, 73 N. C. 198;
Monroe v Collins, 17 Ohio St. 665;
State v Constantine, 42 Ohio St. 437;
Daggett v Hudson, 43 Ohio St. 548;
Chase v Miller, 41 Pa. St. 403;
State v Staten, 6 Coldw. (Tenn.) 233;
United States v Slater, 4 Woods (U. S.)
 356;
Randolph v Good, 3 W. Va. 551;
State v Williams, 5 Wis. 308;
State v Lean, 9 Wis. 279;
State v Baker, 38 Wis. 71;
State v Tuttle, 53 Wis. 45.
 Although, as was shown in § 124, *ante*,

an act of congress may forfeit a man's citizenship as a punishment for desertion during the war, an act of a state legislature, to the same effect, is unconstitutional, where the constitution prescribes the qualifications of voters. *McCafferty v Guyer*, 59 Pa. St. 109.

¹ *Kinneen v Wells*, 144 Mass. 497.

² *Quinn v State*, 35 Ind. 485.

³ *People v Canaday*, 73 N. C. 198.

⁴ *Rison v Farr*, 24 Ark. 161. See also *Davies v McKeeby*, 5 Neva. 369.

⁵ *Post*, §§ 132 to 138.

⁶ *Dyson v Pope*, 71 Ga. 205.

So is a statute providing that one holding a certain office shall not vote, as the acceptance of the office is a waiver of his constitutional right;¹ and the same rule applies to a statute declaring certain persons ineligible to office, or to certain offices.² And a statute is not unconstitutional, which requires a person offering his vote to answer questions relating to his qualifications.³ And it has been held in Kentucky, that a statute, rendering the payment of taxes essential to the right to vote for town officers, is valid, although the constitution contains general provisions respecting the right to vote, which do not specify such a condition, on the ground that the constitutional provisions apply to general and not municipal elections.⁴

§ 127. **Power of legislature as to conventions, caucuses, and unlawful elections.**—The power of the legislature extends to the regulation of political conventions, and political primary meetings or caucuses;⁵ and to the ratification of an illegal election, and the recognition of the title of a person to an office; so that a statute thus providing prevents the state from questioning the latter's right to the office upon *quo warranto*, or otherwise.⁶

II. Who is, and who is not, entitled to vote at an election.

§ 128. **Generally only citizens may vote; who are citizens.**—In considering this question, we shall confine ourselves to such provisions of the constitutions and statutes of the states on this subject, as are of general application, omitting those which are only locally applicable, or relate merely to matters of detail. In most of the states, the right to vote is confined to citizens, although, in some of

¹ *State v Adams*, 2 Stew. (Ala.) 231.

⁴ *Buckner v Gordon*, 81 Ky. 665.

² *People v Clute*, 50 N. Y. 451, rev'g 63 Barb. (N. Y.) 356, and aff'g 12 Abb. Pr. N. S. (N. Y.) 399.

⁵ *In re House Bill*, 9 Colo. 631; *Leonard v Comm.*, 112 Pa. St. 607.

³ *State v Lean*, 9 Wis. 279.

⁶ *People v Flanagan*, 66 N. Y. 237, aff'g 5 Hun (N. Y.) 187.

the western states, an alien, who has declared his intention to become a citizen, is allowed to vote under certain specified restrictions. As a general rule, each state determines for itself who are its citizens, subject to the United States naturalization laws ; but now the constitution of the United States declares that all persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States, and of the states wherein they respectively reside.¹ This provision supersedes several previous rulings of the courts relating to citizenship. It has been held in several cases, and doubtless the provision referred to does not affect the principle, that the child of an American citizen, born in a foreign country, during the temporary sojourn of the father there, is a native citizen.² In an action in the nature of a quo warranto to test the title to an office, where the evidence as to a particular voter was only that he was alien born, it was held that the presumption was that he had been duly naturalized ; but that, if there was *prima facie* evidence that he had not become a citizen, the burden of proving that he had been naturalized was cast upon the party desiring to retain his vote.³

§ 129. **Right of women to vote.**—The question whether, in the absence of an express constitutional or statutory provision, confining the right of suffrage to male citizens, a woman is entitled to vote, is analogous to the question arising upon the right of a woman to hold office, which has already been considered.⁴ And the fourteenth amendment to the constitution of the United States, notwithstanding its general language, does not operate to

¹ U. S. Const., Amendment XIV.

(S. C.) 38;

² *State v Adams*, 45 Iowa, 99;

Aliter, if only the mother is a citizen.

Oldtown v Bangor, 58 Me. 353;

Davis v Hall, 1 Nott and Mc C. (S. C.) 292.

Campbell v Wallace, 12 N. H. 362;

Ludlam v Ludlam, 31 Barb. (N. Y.) 486;

³ *People v Pease*, 27 N. Y. 45, aff'g 30 Barb. (N. Y.) 588.

Sasportas v De la Motta, 10 Rich. Eq.

⁴ *Ante*, §§ 68-70.

confer the right of suffrage upon women.' Where the constitution of a state declares that every male citizen, possessing certain qualifications, is entitled to vote, this excludes females; and a woman, possessing the other qualifications, who attempts to vote at an election, is punishable under a statute against attempting to vote illegally.²

§ 130. **When a man is deemed of age ; application of provision excluding lunatics, etc.**—The requirement is universal that the person offering his vote shall have attained his majority. The rule in this case, as in others where the question arises, is that fractions of a day are disregarded, and a person is deemed to have attained his majority, at the beginning of the last day of his twenty-first year.³ Most of the states also exclude idiots, lunatics, and persons of unsound mind. This provision does not apply to a person whose mind has become greatly enfeebled by illness or old age;⁴ and with respect to actual lunatics or idiots, probably they would be excluded without an express provision to that effect.⁵ A person laboring under hallucinations or delusions, not relating to political matters, and not to such an extent as to prevent his transacting ordinary business, is not excluded by such a provision.⁶

§ 131. **Provisions as to residence ; domicil deemed residence; absence, etc.**—Residence for a specified period in the state is also a universal requirement, and in nearly

¹ *Minor v Happersett*, 21 Wall. (U. S.) 162. See also *ante*, § 124.

² *People v Barber*, 48 Hun (N. Y.) 198. Accord, under an English statute, allowing "a man" to vote, *Chorlton v Lings*, 4 L. R., C. P. 374; 38 L. J. C. P., 25; 19 L. T. Rep., 534; 17 W. R. 284; 1 Hopw. & C., 1.

See also *Chorlton v Kessler*, 4 L. R.,

C. P., 397; 1 Hopw. & C., 42.

³ *State v Clarke*, 3 Harr. (Del.) 557; *Wells v Wells*, 6 Ind. 447; *Hamlin v Stevenson*, 4 Dana (Ky.) 597; *Danvers v Boston*, 10 Pick. (Mass.) 512.

⁴ *Sinks v Reese*, 19 Ohio St. 336.

⁵ *Id.*

⁶ *Clark v Robinson*, 88 Ill. 498.

all the states residence in the county, town, and election district, for specified periods is also required. The questions, whether under particular circumstances a person is deemed or not deemed a resident, and those relating to the loss or retention of a residence once gained, are substantially the same in cases involving the right to vote, as in the numerous other branches of the law where the same questions arise; and do not call for an extended examination here. The general rules are, that for the purpose of voting, a person's domicil is deemed his residence;¹ and that he does not lose his residence by absences, however long and frequent, as long as he has an *animus revertendi*;² even although he may have unlawfully voted in the place where he was sojourning.³ So, although it is provided in the constitution or by statute, that a person shall not gain or lose a residence by his attendance at a college or other institution of learning, that does not prevent one from gaining a residence in the place where the college which he attends is established, if he actually manifests an intent to make that place his permanent home, irrespectively of the collegiate course.⁴ An interesting and instructive decision, arising upon a constitutional provision, to the effect that a person shall not be deemed to have gained or lost a residence, while an inmate of any almshouse or other

¹ Preston v Culbertson, 58 Cal. 198;
Fry's case, 71 Pa. St. 302, and cases
there cited.

In a case of doubt, the question of
residence is for the jury. People
v Teague, 106 N. C. 576.

Residence once acquired continues
until a new one is acquired, or clear
evidence of abandonment of the for-
mer residence is produced.

Kreitz v Behrensmeyer, 125 Ill. 141;

Moffett v Hill, 131 Ill. 239;

Harbaugh v Cicott, 33 Mich. 241;

Sturgeon v Korte, 34 Ohio St. 525;

Fry's case, 71 Pa. St. 302;

State v Aldrich, 14 R. I. 171.

For rulings on the question of resi-
dence, with respect to the right to
hold office, see *ante*, § 80.

² Wheat v Smith, 50 Ark. 286;

Dennis v State, 17 Fla. 389;

Moffett v Hill, 131 Ill. 239;

Pedigo v Grimes, 113 Ind. 148;

Wilbraham v Ludlow, 99 Mass. 587.

³ O'Hair v Wilson, 124 Ill. 351.

⁴ Sanders v Getchell, 76 Me. 158.

asylum, at public expense, is cited at length in a subsequent portion of this chapter.¹

III. Validity and effect of registration laws.

§ 132. **Power of legislature to enact registration laws when constitution is silent.**—The constitutions of some of the states allow or require, while those of others expressly forbid, the passage of registration acts. Where the constitution is silent upon the subject, it is settled by preponderating authority that the legislature has power to pass a registration act, and to exclude from the right to vote those who fail to comply with its provisions, provided that the regulations are “subordinate to the enjoyment of the right to be regulated. The right must not be impaired by the regulation; it must be regulation purely, not destruction.”² It was said by Shaw, Ch. J., in a case decided in 1832, that the registration law does not add to the constitutional qualifications; that the constitutional provisions, respecting the qualifications of voters, necessarily require an examination of the voter’s claim to vote; and consequently that if the constitution “has made no provision in regard to the time, place, and manner, in which such examination shall be had, and yet such an examination is necessarily incident to the actual enjoyment and exercise of the right of voting, it constitutes one of those subjects, respecting the mode of exercising the right, in relation to which it is competent to the legislature to make suitable and reasonable regulations, not calculated to defeat or impair the right of voting, but rather to facilitate and secure the exercise of that right.”³ The same principles have been recognized

¹ *Silvey v Lindsay*, 107 N. Y. 55, cited *post*, § 154.

² *Page v Allen*, 58 Pa. St. 338, per Thompson, Ch. J., p. 347.

³ *Capen v Foster*, 12 Pick. (Mass.) 485, per Shaw, Ch. J., p. 492.

in numerous other cases.¹ But it was held in Oregon, that where the constitution prescribes the qualifications of voters, a statute imposing the additional requirement of registration is unconstitutional.²

§ 133. **Various rulings as to particular regulations in registration acts.**—Whether a particular regulation is or is not “reasonable,” and is or is not calculated to impair the constitutional right to vote, must obviously depend, in most instances, upon the peculiar character of the regulation itself; for it is impossible, in such cases, to lay down any but the most general rules. Where a person is required, by the registration act, as a condition of being registered so as to vote, to take an oath, embracing a qualification different from that prescribed in the constitution the condition is void.³ So where he is required to take an oath that he has not been guilty of certain acts, which will forfeit his right of suffrage.⁴ But it is proper and lawful to require him to take an oath as to his residence, citizenship, or the like;⁵ but not to require him to prove his qualifications by the oaths of others.⁶ A provision in a registration law, requiring a person, who has been absent for a certain length of time from the state, to produce, when he offers to vote, a certificate

¹ *Byler v Asher*, 47 Ill. 101;
Edmonds v Banbury, 28 Iowa 267;
State v Butts, 31 Kan. 537;
Comm. v McClelland, 83 Ky. 686;
Kinneen v Wells, 144 Mass. 497;
State v Baker, 38 Wis. 71.
 See also *Hyde v Brush*, 34 Conn. 454;
McMahon v Mayor, 66 Ga. 217;
People v Hoffman, 116 Ill. 587;
Morris v Powell, 125 Ind. 281;
Auld v Walton, 12 La. Ann. 129;
People v Kopplekom, 16 Mich. 342;
Perkins v Carraway, 59 Miss. 222;
State v Corner, 22 Nebr. 265;
People v Canaday, 73 N. C. 198;

Monroe v Collins, 17 Ohio St. 665;
Daggett v Hudson, 43 Ohio St. 548;
Comm. v Maxwell, 27 Pa. St. 444;
Patterson v Barlow, 60 Pa. St. 54;
Cusick's Election, 136 Pa. St. 459;
In re Polling Lists, 13 R. I. 729;
State v Staten, 6 Coldw. (Tenn.) 233.
² *White v County Com'rs*, 13 Ore. 317.
³ *Page v Allen*, 58 Pa. St. 338;
Davies v McKeeby, 5 Neva. 369;
Clayton v Harris, 7 Neva. 64.
⁴ *Burkett v McCarty*, 10 Bush (Ky.) 758.
⁵ *People v Hoffman*, 116 Ill. 587.
⁶ *People v Canaday*, 73 N. C. 198.

that he has been continuously on the tax list, and is a tax payer, is unconstitutional, as it in effect requires a property qualification, which the constitution does not require; and a provision that a resident, who has been absent for six months, or a person who has not resided in the county for six months, shall be registered at least ninety days before the election, is unconstitutional, because it in effect requires a residence of ninety days within the precinct, whereas the constitution requires a residence of only thirty days.¹

§ 134. **The same subject.**—A registration law, which deprives an elector of his right to vote, unless he is registered on one of four days, the last of which is ten days before the election, is unconstitutional, because the condition is unreasonable.² So where seven days are allowed for registry, the last of which is five days before the election.³ Whether the legislature can constitutionally provide that the registry shall be closed before the election, without making any provision to add the name of one, who, for some sufficient reason, was not seasonably registered, is a question upon which the authorities are in conflict. It has been held that such a statute was unconstitutional by the courts in Nebraska, Ohio, and Wisconsin;⁴ and that it was constitutional by the supreme court of Illinois, the supreme court of Rhode Island, and in Georgia, by a United States court.⁵ A registration law is not unconstitutional, because it pre-

¹ *Morris v Powell*, 125 Ind. 281.

² *State v Corner*, 22 Nebr. 265.

³ *Daggett v Hudson*, 43 Ohio St. 548.

⁴ *State v Corner*, 22 Nebr. 265.

Daggett v Hudson, 43 Ohio St. 548;

Dells v Kennedy, 49 Wis. 555. But in the latter case it was also held, following *State v Baker*, 38 Wis. 71, that

if a voter knows his name is not on the registry, and he is not under any disability to procure it to be seasonably put on, he is a voluntary party to his own disfranchisement, and cannot complain thereof.

⁵ *People v Hoffman*, 116 Ill. 587; *In re Polling Lists*, 13 R. I. 729; *Weil v Calhoun*, 25 Fed. Rep. (U. S.) 865.

scribes different regulations for different parts of the state;¹ as where the rules are more stringent in cities than in the rural districts.*

§ 135. **Power of legislature to exclude for not registering; right to register after time.**—Subject to the requirement that the regulations must be reasonable, the power of the legislature to provide for registration includes the power to exclude from voting those who fail to be registered.³ The effect of registration, or of an omission to be registered, as evidence of the right or want of right to vote, or whether a person must be registered more than once, depends upon the peculiar provisions of the statute.⁴ Under the registration law for New York city, which provided for the closing of the registration at 9 o'clock P. M., it was held that voters, who were waiting at that hour in their proper district, were entitled to be registered after the hour, but not those who applied after the hour.⁵

§ 136. **Is board judicial; liability of members to private actions.**—It has been held that a board of registration, having power to decide upon the qualifications of voters, exercises judicial powers, and that the members thereof are not liable to a private action, if they act in good faith, and within their jurisdiction.⁶ But in another case it has been said that a qualified voter, who is not permitted to register, may have a remedy by mandamus against the members of the board.⁷

¹ *People v Hoffman*, 116 Ill. 537;
Patterson v Barlow, 60 Pa. St. 54.

² *Comm. v McClelland*, 83 Ky. 686.

³ *People v Laine*, 33 Cal. 55;
Webster v Byrne, 34 Cal. 273;
Byler v Asher, 47 Ill. 101;
Edmonds v Banbury, 28 Iowa, 267;
People v Wilson, 62 N. Y. 186;
Cusick's Election, 136 Pa. St. 459.

⁴ *Cohen v Harvey*, 56 Cal. 70;

Hyde v Brush, 34 Conn. 454;
Auld v Walton, 12 La. Ann. 129;
People v Koppelkom, 16 Mich. 342;
Perkins v Carraway, 59 Miss. 222;
State v Staten, 6 Cold. (Tenn.) 233;
State v Stumpf, 23 Wis. 630.

⁵ *People v Hosmer*, 2 How. Pr. N. S. (N. Y.) 472.

⁶ *Perry v Reynolds*, 53 Conn. 527.

⁷ *Davies v McKeeby*, 5 Neva. 369.

§ 137. **Unconstitutionality of registration law ; misconduct of registration officers, effect of.**—Where a registration law is unconstitutional, as where it directs the division of the wards of a city into precincts, and a large portion of one ward is not included in any precinct, so that the voters therein cannot be registered, an election under such an act is void.¹ But it seems, that if an election is held under an unconstitutional registration law, proof must be made, in order to invalidate it, that voters sufficient in number to have changed the result were prevented from voting.² So, also, if the members of the board of registration, by absenting themselves from the place of registration, or by resigning, or otherwise, prevent a registration, whereby voters, in sufficient number to have changed the result, were prevented from voting, the election is void; and probably the rule is the same, without proof that the result was thus affected.³

§ 138. **Effect of formal errors, etc., and instances.**—But the courts will regard indulgently the proceedings of a board of registration, if their duties were discharged in good faith, and will not suffer the registration, or the election thereunder, to be defeated, by a failure to follow strictly the directions of the statute, where they can be regarded as merely directory; or by any mistake or slip, which does not substantially affect the fullness or fairness of the registry;⁴ as where the registry did not contain the voters' names in alphabetical order, and omitted to state their residences, as the statute required; and the

¹ *People v Canaday*, 73 N. C. 198.

² *Weil v Calhoun*, 25 Fed. Rep. (U. S.) 865.

³ *Zeiler v Chapman*, 54 Mo. 502.

See also *State v Albin*, 44 Mo. 346;

People v Canaday, 73 N. C. 198;

McDowell v Mass., etc., Construction Company, 96 N. C. 514.

⁴ *Barnes v Pike County*, 51 Miss. 305;

People v Cook, 8 N. Y. 67, aff'g 14 Barb. (N. Y.) 259;

People v Wilson, 62 N. Y. 186, rev'g 3 Hun (N. Y.) 437;

Stinson v Sweeney, 17 Neva. 309;

Newsom v Earnhart, 86 N. C. 391.

See also *State v Com'rs*, 20 Fla. 859.

lists were not certified, etc., as the statute required; but the registry lists were used at the election, and there was no proof that any illegal votes were cast, or any qualified voter was excluded.¹ So an election is not vitiated because some of the voters were registered on a Sunday, the statute having fixed a period for registration which included that day.² Where the statute provides for an election, under such circumstances that the registration cannot be made, as at an earlier time than that fixed for the registration; or where no board has been appointed, or the members have refused to act; or for any reason, no list can be made; in such a case the election is valid without any registration.³ And where, at a meeting of the common council of a city, held for the purpose of complying with the registration act, a motion to adjourn, without transacting the business, was made, and the presiding officer, without taking the vote, declared the meeting to be adjourned, and left the chair, and the members thereupon voted one of their number into the chair; whereupon eleven of the members present left the room, and the fifteen who remained, they being in number one less than a quorum, proceeded to make assignments of aldermen, and appointments of registration officers, as required by the statute; it was held that the voters would not be disfranchised by such unlawful proceedings, that the registration was valid, and the officers so appointed were *de facto* officers as far as they had acted; but that they could not act thereafter, and a mandamus was granted to compel the common council to meet again and appoint new officers.

¹ State v Baker, 38 Wis. 71.

² State v Schnierle, 5 Rich. L. (S. C.) 299.

³ Campbell v Braden, 31 Kan. 754;

State v Piper, 17 Nebr. 614.

See, however, People v Laine, 33 Cala. 55;

Nefzger v Davenport, etc. R.R. Comp'y, 36 Iowa 642;

People v Koppelkom, 16 Mich. 342;

State v Albin, 44 Mo. 346;

Zeiler v Chapman, 54 Mo. 502.

* Dingwall v Detroit, 32 Mich. 568.

IV. General principles respecting elections, and voting thereat; ballots; defective ballots.

§ 139. **Majority and plurality; absentees; rule where two or more officers of same designation are to be chosen.**—The general object of an election is to ascertain the will of the majority of the voters, with respect to the person to fill a particular office. But this expression is subject to some qualifications. Where there is no special constitutional or statutory provision, requiring that a candidate shall receive an actual majority over all his competitors, and the votes of the electors are divided between three or more candidates for one office, the rule is that a plurality suffices to elect.¹ Where the constitutional or statutory provision requires that the officer should be chosen by a majority of the voters, either of a particular district or of the entire state, this does not mean that a majority of all those, who are entitled to vote, in the district or in the state, shall vote for him, or shall vote at the election, but that he shall be chosen by a majority of the votes actually cast. “All qualified voters, who absent themselves from an election duly called, are presumed to assent to the expressed will of the majority of those voting, unless the law providing for the election otherwise declares. Any other rule would be productive of the greatest inconvenience, and ought not to be adopted, unless the legislative will to that effect is clearly expressed.”² Where two or more

¹ Paine on Elections, §§ 173, 174;
Naar on Elections, 147;
Cooley Const. Lim., 5th ed., 779 (*620)
People v Clute, 50 N. Y. 451, per Folger,
J., pp. 461 *et seq.*

² Cass County v Johnston, 95 U. S. 360,
per Waite, Ch. J., p. 369.
See also, People v Warfield, 20 Ill. 159;
People v Garner, 47 Ill. 246;

People v Wiant, 48 Ill. 263;
State v Swift, 69 Ind. 505;
Talbot v Dent, 9 B. Mon. (Ky.) 526;
Taylor v Taylor, 13 Minn. 107;
Everett v Smith, 22 Minn. 53;
State v Mayor, etc., 37 Mo. 270;
State v Lancaster County, 6 Nebr. 474;
People v Clute, 50 N. Y. 451;
Louisville, etc., R. R. Comp'y v David-
son County Court, 1 Sneed (Tenn.) 637;
St. Joseph v Rogers, 16 Wall. (U. S.) 644.

officers of the same designation are to be chosen, that number of the persons voted for who stand highest on the voting lists, will be elected.¹

§ 140. **Constitutionality of statutes relating to "minority representation," or "cumulative voting."**—The supreme court of Ohio has adjudged that a statute, providing that each elector shall vote for a portion only of several officers to be elected, or in other words establishing "minority representation," is repugnant to the general grant of the right of each elector to vote, contained in the constitution of the state. Upon that point the court said: "No such thing as 'minority representation' or 'cumulative voting' was known in the policy of this state, at the time of the adoption of this constitution in 1851. The right of each elector to vote for a candidate, for each office to be filled at an election, had never been doubted. No effort was made by the framers of the constitution to modify this right; and we think it was intended to continue and guaranty such right, by the provision that 'each elector shall be entitled to vote at all elections.' Such right is denied by this statute, which provides for the election of four members of the board of police commissioners, but denies to any elector the right to vote for more than two persons for such commissioners."² The same question has been twice presented to the court of appeals of the state of New York, but under such circumstances that the court refused to pass upon it. In each of the cases referred to, an action in the nature of a quo warranto was brought, to oust municipal officers, who had been elected under a statute allowing each elector to vote for a part only of the officers to be chosen; and the court held that in such a form of action the question of the constitutionality of

¹ Cooley Const. Lim., 5th ed., 779 (*620.)

² State v Constantine, 42 Ohio St. 437.

the statute did not properly arise.¹ In the latter case, the court, after holding that the provision which was said to be unconstitutional was separable from the remainder, so that, if it should be stricken out of the statute, the statute would still be complete, continued as follows: "Therefore, whether we regard these restrictions contained in section 4 as authorized or unauthorized by the constitution, the defendants could have been elected under that act; and we must hold that they were legally elected thereunder. So far as the case discloses, every voter in the city voted for as many candidates for aldermen at large, as he wished to. It does not appear that any voter claimed the right to vote for all the six aldermen; and was denied that right. If he chose voluntarily to waive his constitutional right to vote for six, and to vote for but four, that he could do, and his ballot would be a valid ballot. So in the senatorial districts, it does not appear that any voter was denied the right to vote for the three aldermen; and if the voter chose to vote for but two, his ballot would be legal, and no one could complain. If a voter had offered to vote for the six aldermen at large, or for the three aldermen of a senatorial district, and had been refused, he could, by mandamus, or by some other form of action, have presented to the courts the question of his constitutional right to vote for as many candidates as there were aldermen to be elected. So if six of these plaintiffs had been candidates for aldermen at large, and had all been voted for upon a single ticket by the same persons, and had received more votes in that way than any other candidates, they could have claimed to be legally elected, and by proper proceedings could have brought before the courts the question of the constitutionality of the restrictions

¹ *People v Perley*, 80 N. Y. 624;
People v Kenney, 96 N. Y. 294.

See also *People v Crissey*, 91 N. Y. 616.

contained in the act of 1873. There are ways enough in which to test the constitutionality of those restrictions, but they are not involved in this case.”¹ And the supreme court of Michigan has held, that a statute, allowing “cumulative voting” for representatives to the state legislature, in districts where two or more are to be chosen, by permitting each elector to cast as many votes for one person, as there are representatives to be elected, is unconstitutional.²

§ 141. **Voting by proxy; voting in instalments; voting twice.**—In some states it has been provided, that a voter, absent in the military or naval service of the United States, may authorize another to cast his vote at an election: but except where such a special provision exists, a voter must always cast his vote in person, and voting by proxy is not recognized. But where an infirm voter selects his ballot, and, at the polls, authorizes another to deposit it in his presence, this is not deemed to be voting by proxy, and is lawful.³ A voter may vote for a part only of the officers to be elected; but he cannot vote by instalments, that is, for one or more officers at one time and for others at a different time; if he fails to exercise his full right, when he casts his vote, he cannot cast another for the omitted officers, at a subsequent time during the polling.⁴ And if he has once voted, although in a precinct where he was not entitled to vote, he cannot lawfully vote again in his own precinct.⁵

§ 142. **Australian and reformed systems; voting for formally nominated candidates; constitutionality.**—With respect to the statutes prescribing the “Australian” or

¹ *People v Kenney*, 96 N. Y. 294, per Earl, J., pp. 303, 304.

See, however, *People v Blodgett*, 13 Mich. 127.

² *Maynard v District Canvassers*, 84 Mich. 228.

⁴ *Simpson v Brown*, 2 N. Y. Supp. 571; 18 N. Y. St. Rep. 781.

³ *Clark v Robinson*, 88 Ill. 498.

⁵ *Harbaugh v Cicott*, 33 Mich. 241.

other "reformed" "system of voting," they are of such recent introduction into this country, that but few adjudications thereupon have appeared; but the tendency of those is to establish the rule, which is doubtless the correct one, that the constitutionality of such statutes depends upon the same general principles as the constitutionality of the registry laws. Such a statute must not deprive an illiterate voter of such aid, as may be necessary to enable him to cast his ballot intelligently, and with a clear understanding of its effect; and a statute which requires "each voter to retire to a compartment and there, alone and unaided, indicate, by a mark on his ballot," the candidate for whom he wishes to vote for numerous offices, is unconstitutional, because it accomplishes that result.¹ An extended discussion upon the proposition that such a statute must not deprive illiterate voters of the necessary aid, and upon other features of a "ballot reform law," will be found in a recent decision of the supreme court of Michigan holding such a statute of that state to be constitutional.² In many of the states, the voting is restricted to such candidates, as have been previously formally nominated, in a mode indicated by the statute. The constitutionality of such a provision, has not, as far as the author has been able to ascertain, been directly passed upon by the courts; but in some adjudications construing the provision, its constitutionality has been impliedly assumed.³

§ 143. **Constitutionality of statutes as to marks, etc., and numbering ballots.**—It rests entirely with the state to prescribe, whether the vote shall be taken orally or by ballot. In fact, voting at general elections is universally required to be by ballot; but the practice varies with respect to town meetings, and other local elections.

¹ *Rogers v Jacob*, 88 Ky. 502.

² *In re Cowie*, 25 Abb. N. C. (N. Y.) 455;

³ *Detroit v Rush*, 82 Mich. 532.

People v Rice, 25 Abb. N. C. (N. Y.) 460.

Where the constitution provides for a written ballot, it is satisfied by a printed ballot.¹ In many of the states it is forbidden to use ballots having any distinctive mark, device, or sign; and ballots of a uniform size, color and style of paper are provided for; and in some states only official ballots, that is, ballots furnished by the public authorities, can be used. Where marked ballots are forbidden, it has been held that if the marks cannot be seen until the ballots are opened, the inspectors must nevertheless reject them.² But it has also been held that where such ballots have been received without question, they cannot afterwards be rejected.³ Statutes of this character are deemed constitutional, although not expressly authorized by the constitution; inasmuch as the object of requiring the voting to be by ballot is to secure secrecy as to the persons voted for by each elector, and thus protect him from intimidation, or other influences calculated to prevent the full and free expression of his wishes. Such statutes are deemed to have this object in view;⁴ and they will be construed with reference to this object, and will not receive either an extended or restricted interpretation, which is calculated to defeat it, or unnecessarily to interfere with the voter's exercise of his right of suffrage.⁵ And, on the other hand, it has been held that in the absence of a constitutional provision, allowing ballots to be distinctively marked, a statute requiring the inspectors to mark each ballot so as to correspond to the voter's number on the poll list was unconstitutional, as tending to

¹ *Henshaw v Foster*, 9 Pick. (Mass.) 312;
Temple v Mead, 4 Vt. 535.

² *Oglesby v Sigman*, 58 Miss. 502.

³ *Opinion of the Justices*, 70 Me. 536.

⁴ *Cooley Const. Lim.*, 5th ed., 760. (*604,
 605.)

⁵ *Kirk v Rhoads*, 46 Cal. 398;
Wyman v Lemon, 51 Cal. 273;
Hodge v Linn, 100 Ill. 397;
O'Hair v Wilson, 124 Ill. 351;
Druliner v State, 29 Ind. 308;
State v Wolf, 17 Oreg. 119;
State v Phillips, 63 Tex. 390.

impair the secrecy of the ballot.¹ But where such a statute is constitutionally passed, the failure to number a ballot is not such an irregularity as will justify the rejection of the vote.²

§ 144. Application of such statutes to particular cases.—

Where a statute provides that all ballots shall be prepared “on plain white paper” to be furnished by the secretary of the state, and without any mark or designation, it was held that ballots printed on tinted paper, furnished by the secretary of state, were lawful.³ Under a similar statute, it was held a printed heading, “City Union ticket,” on the inside of a ballot, was not “a distinguishing mark or embellishment” within a state prohibiting such marks, etc.⁴ A diamond shaped ballot is not within a statutory prohibition of “devices;”⁵ nor do the erasing of a name, so that the discoloration shows through the paper, and writing another name in its place,⁶ or covering a candidate’s printed name with a “paster,”⁷ come within a statutory prohibition of a distinguishing “device” or “mark.” But it has been held that “printers’ dashes or ornamentation,” and a dotted line across the face of the ballot, constitute such a forbidden “device” or “mark;”⁸ that a figure of an eagle, used as a mark to distinguish the tickets of a particular party, is a prohibited distinguishing mark;⁹ and that ballots printed upon paper of a different size than that which the statute prescribes,¹⁰ or upon colored paper,

¹ *Williams v Stein*, 38 Ind. 89.

² *O’Hair v Wilson*, 124 Ill. 351.

³ *State v Wolf*, 17 Oreg. 119.

See also *People v Kilduff*, 15 Ill. 492.

⁴ *Druliner v State*, 29 Ind. 308.

See also *Millholland v Bryant*, 39 Ind. 363;

Shields v McGregor, 91 Mo. 534;

Williams v State, 69 Tex. 338.

⁵ *State v Phillips*, 63 Tex. 390.

⁶ *Wyman v Lemon*, 51 Cal. 273.

⁷ *Quinn v Markoe*, 37 Minn. 439.

⁸ *Oglesby v Sigman*, 58 Miss. 502;
Steele v Calhoun, 61 Miss. 556;

⁹ *Comm. v Woelper*, 3 S. & R. (Pa.) 29.

¹⁰ *Reynolds v Snow*, 67 Cal. 497.

where the statute requires white paper,¹ must be rejected. But where a statute requires the ballots for judicial officers to be placed in a separate box, the word “Judiciary,” printed upon the back of such a ballot, is not a distinguishing mark or device, within the statutory prohibition.²

§ 145. **General rules as to ballots; defects, imperfections, erasures, and irregularities therein.**—Where a ballot, cast at an election, has upon it the names of two or more persons for an office to which one person is to be elected, or, if two or more officers of the same designation are to be elected, the names of more persons than there are officers to be elected, it is ineffectual; and not only must it be rejected upon the canvassing of the votes, but proof will not be admitted, upon the trial of an action to determine the title to the office, to show for whom the elector intended to vote.³ But it is immaterial how many names a ballot contains for other offices, provided it contains only one name for the particular office in question; for in that case it shall be counted for the office in question, as if it was in all respects regular.⁴ We shall consider hereafter⁵ the powers and duties of canvassers, with respect to the allowance to a candidate of ballots, upon which his name is imperfectly given. Such ballots may, in many cases, be allowed to the candidate by a jury in an information in the nature of a quo warranto, or other proceeding to test the title to the office. To what extent, and upon what evidence, they may be so allowed, are questions upon which the adjudications are not harmoni-

¹ *State v McKinnon*, 8 Oreg. 493.

² *State v Barden*, 77 Wis. 601.

³ *People v Seaman*, 5 Denio (N. Y.) 409;
People v Ames, 19 How. Pr. (N. Y.) 551;
State v Tierney, 23 Wis. 430.

See also, *Kreitz v Behrensmeyer*, 125 Ill.
141;

People v Loomis, 8 Wend. (N. Y.) 396.

⁴ *McCrary on Elections*, § 497;

Paine on Elections, § 552.

See also, *Perkins v Carraway*, 59 Miss.
222;

Att'y Gen'l v Ely, 4 Wis. 420.

⁵ *Post*, §§ 158, 159.

ous. It is clear that a perfect ballot is conclusive evidence of the voter's intention, and that proof cannot be received of his intention to vote for a person, whose name is not given therein, even imperfectly.¹ But the weight of the American authorities supports the doctrine, that where a ballot contains only the candidate's surname, or his other names are designated only by initials; or where there is an omission of or a mistake in his middle name, or in an initial which was intended to stand for it; or in any other case of similar imperfections in a ballot, which have led to its rejection by the canvassers; it may, in a proceeding to test the title to the office, be allowed to the candidate for whom it was intended, upon satisfactory evidence of the voter's intention to cast it for him.² In some cases it has been held, that the voter's own testimony is competent and satisfactory evidence of such an intent;³ but the weight of the authorities is against the right to examine the voter himself as to his intent,⁴ and indicates that this must be inferred from the surrounding circumstances, as that there was no other candidate for the office whose name was the same as, or resembled, that used in the ballot, and other similar circumstances.⁵

¹ *Wimmer v Eaton*, 72 Iowa 374;
People v McNeal, 63 Mich. 294;
People v Seaman, 5 Denio (N. Y.) 409;
People v Saxton, 22 N. Y. 309.

² See cases hereinafter cited. The principal dissent to this rule comes from Michigan, where it has been held that a ballot containing only the initials of a candidate's name, cannot be allowed to him. *People v Tisdale*, 1 Dougl. (Mich.) 59; *People v Higgins*, 3 Mich. 233; *People v Cicott*, 16 Mich. 283; followed in the recent case of *People v McNeal*, 63 Mich. 294, wherein Morse, J., dissenting from this ruling, said: "It is at variance with the rule in almost all the states of the Union, and there is no sense or

justice in it." But, even in Michigan, it has been held that in an information in the nature of a quo warranto, a vote for "John Jochim" should be allowed to John W. Jochim. *People v Kennedy*, 37 Mich. 67.

³ *McKinnon v People*, 110 Ill. 305;
People v Pease, 27 N. Y. 45.

⁴ *Wimmer v Eaton*, 72 Iowa 374.

⁵ In a case where printed votes, cast for "F. Wimmer" were allowed to Edward Wimmer, the printer testified that he knew the contestant was a candidate, and supposed his name was F. Wimmer, and those who voted testified that such was also their supposition. *Wimmer v Eaton*, 72

In New York, it has been held, upon an information in the nature of a quo warranto, that where a voter writes, upon a printed ballot, the name of a person in connection with the title of the office, and fails to erase the printed name of another person for the same office, his vote for the former must be allowed. The court said: "The intention of the voter is to be inferred, not from evidence given by him of the mental purpose with which he deposited his ballot, or his notions of the legal effect of what it contained or omitted, but by a reasonable construction of his acts;" and added that the judge at the trial ought to have charged the jury, that, as matter of law, they were bound to find the fact accordingly from the face of the ballot.¹ And in Texas, upon a similar information, where a ballot contained two names for the same office, of which one was distinctly and the other faintly erased with a pencil, the testimony of the voter, that the latter erasure was unintentional, was held to be competent.² If a "paster" is detached by the inspector, while can-

Iowa 374. In another case, where it appeared that most of the voters were Germans by birth, it was held that votes for "J. D. Huba," "J. D. Hubba," "Huber," "J. D. Hub," and "D. Huber" should be allowed to Joel D. Hubbard. *Gumm v Hubbard*, 97 Mo. 311. Votes for Benjamin Welch were allowed to Benjamin Welch, Junior, upon a finding that they were intended for him. *People v Cook*, 8 N. Y. 67, aff'g 14 Barb. (N. Y.) 259. So where the voter omitted entirely the candidate's first name. *Talkington v Turner*, 71 Ill. 234; *Kreitz v Behrensmeyer*, 125 Ill. 141; or the surname was misspelled, but *idem sonans*. *Newton v Newell*, 26 Minn. 529.

In another case, votes for "D. M. Carpenter," "M. D. Carpenter," "M. T. Carpenter," and "Carpenter" were

allowed, upon a jury trial, to Matthew H. Carpenter. *Att'y Gen'l v Ely*, 4 Wis. 420. In all these cases, the surrounding circumstances and in many the intrinsic probabilities, appear to have chiefly determined the question of fact. For additional cases of this character, see *State v Judge*, 13 Ala. 805; *State v Gates*, 43 Conn. 533; *Clark v Robinson*, 88 Ill. 498; *Brown v McCollum*, 76 Iowa 479; *Clark v Co. Exam'rs*, 126 Mass. 282; *People v Tisdale*, 1 Dougl. (Mich.) 59; *State v Williams*, 95 Mo. 159; *People v Ferguson*, 3 Cow. (N. Y.) 102; *People v Vail*, 20 Wend. (N. Y.) 12; *People v Seaman*, 5 Denio (N. Y.) 409; *State v Foster*, 38 Ohio St. 599.

See also cases cited in note to § 159.

¹ *People v Saxton*, 22 N. Y. 309.

² *Davis v State*, 75 Tex. 420.

vassing the votes, that fact may be proved upon a similar information.¹

V. Rules of construction of statutes regulating the time, place, and manner of holding elections, and the notice thereof.

§ 146. **Election statutes directory as to matters of form, detail, etc.**—While the general proposition is unquestionable, that an election is not valid, unless it is held at a time and place, in a manner, and by officers, specified in the constitution or statutes of the state, or at a time and place and before officers, designated and appointed, pursuant to a constitutional or statutory direction, by some public authority;² yet the courts incline to regard the various statutory regulations respecting the proceedings before and during an election, the canvassing of the votes, the declaration of the result, and the granting of a certificate to the successful candidate, as mandatory, only with respect to their essential characteristics, and as directory with respect to all matters of form or of detail, where no substantial right has been violated, and the statute itself does render essential a strict conformity to its provisions in such matters.³

§ 147. **Instances where directory provisions were disregarded.**—Thus it is not a valid objection to an election that the officers who conducted it were disqualified;⁴ or

¹ *People v McNeal*, 63 Mich. 294.
See also *post*, § 158.

² *Dickey v Hurlburt*, 5 Cal. 343;
Franklin v Kaufman, 65 Ga. 280;
Stephens v People, 89 Ill. 337;
Varney v Justice, 86 Ky. 596;
In re Melvin, 68 Pa. St. 333;
Brewer v Davis, 9 Humph. (Tenn.) 208;
Gerarty v Reid, 78 N. Y. 64;
People v Schiellein, 95 N. Y. 124;

Pratt v Swanton, 15 Vt. 147;
Brodhead v Milwaukee, 19 Wis. 624.

³ *Cooley Const. Lim.*, 5th ed., 88-93 (*74-78);
McCrary on Elections, §§ 190-192;
Paine on Elections, §§ 312, 358, 373, 381, 502, 600.

⁴ *Collins v Huff*, 63 Ga. 207;
Wilson v Peterson, 69 N. C. 113.
See also *Swepton v Barton*, 39 Ark. 549;
Keller v Chapman, 34 Cal. 635.

had not been sworn;¹ or were not appointed until after the expiration of the time prescribed by the statute,² or that their appointment was otherwise irregular,³ or that they did not follow the statute in all particulars with respect to the reception of the votes, and making their returns, where it does not appear that the result was affected thereby.⁴ With respect to the proceedings during the election, a learned judge has forcibly said: "It is probably impracticable to prescribe a rule which will enable us to determine, in all cases, what irregularities of the inspectors will vitiate an election. It may be safely affirmed, that if the irregularity does not deprive a legal voter of his right, nor admit a disqualified person to vote, if it casts no uncertainty on the result, and has not been occasioned by the agency of a party seeking to derive a benefit from it; it may be overlooked in an action of this kind" (quo warranto) "when the issue is as to which candidate received the greater number of votes for a particular office, at a given election."⁵ And it has even been held that an election is not vitiated because the election officers permitted other persons to count the votes, it not appearing that the count was incorrect, and the election officers having certified to the result.⁶ Without multiplying detailed statements of the particular irregularities which have been disregarded by

¹ *Whipley v McKune*, 12 Cala. 352;
Rounds v Smart, 71 Me. 380;
Wells v Taylor, 5 Monta. 202;
Trimmier v Bomar, 20 S. C. 354.
 So where the voters were sworn in a book other than the Bible. *People v Cook*, 8 N. Y. 67.

² *People v Police Board*, 46 Hun (N. Y.) 296.

³ *Keller v Chapman*, 34 Cala. 635;
Rounds v Smart, 71 Me. 380.

⁴ *Whipley v McCune*, 12 Cala. 352;
People v Nordheim, 99 Ill. 553.

⁵ *People v Cook*, 8 N. Y. 67, per Willard, J., p. 93. The opinions in this case, on the appeal, and also in the supreme court (14 Barb. (N. Y.) 259), contain a large collection of authorities, and an extended discussion, as to what provisions of the statute are regarded as merely directory.

See also *Dows v Irvington*, 13 Abb. N. C. (N. Y.) 162.

⁶ *State v Calvert*, 98 N. C. 580.
 See also *People v Nordheim*, 99 Ill. 553.

the courts, in determining whether an election was or was not valid, we append in the note a collection of authorities upon the proposition, that mere omissions or irregularities in following the directions of the statute, will not affect the validity of an election, if they did not affect the result; but in such cases the directions of the statute will be construed as being directory, not mandatory.¹

§ 148. **What directions are deemed mandatory.**—As a general rule, a constitutional or statutory provision respecting the time of holding an election, or the period of time during which the polls must be kept open, is regarded as mandatory and not directory, so that a failure to observe it will vitiate the election.² But it has been held that where the polls were closed a short time before the hour fixed, and it did not appear that any one offered to vote afterwards, and before the lawful time for closing them, the election was not vitiated;³ and that where the polls were held open after the hour fixed, the election was not invalidated, unless the votes

¹ *Woodward v Sarsons*, 44 L. J., C. P.; 295 10 L. R., C. P., 733; 32 L. T. Rep. 867; *Whipley v McKune*, 12 Cal. 352; *Satterlee v San Francisco*, 23 Cal. 314; *Sprague v Norway*, 31 Cal. 173; *Keller v Chapman*, 34 Cal. 635; *Collins v Huff*, 63 Ga. 207; *Hardin v Colquitt*, 63 Ga. 588; *Franklin v Kaufman*, 65 Ga. 260; *Walker v Sanford*, 78 Ga. 165; *Dobyns v Weadon*, 50 Ind. 298; *Morris v Vanlaningham*, 11 Kan. 269; *Russell v State*, 11 Kan. 308; *Jones v Caldwell*, 21 Kan. 186; *Trustees, etc. v Garvey*, 80 Ky. 159; *Taylor v Taylor*, 10 Minn. 107; *Quinn v Markoe*, 37 Minn. 439; *Wells v Taylor*, 5 Monta. 202;

People v Wilson, 62 N. Y. 186; rev'g 3 Hun (N. Y.) 437; *Wilson v Peterson*, 69 N. C. 113; *State v Nicholson*, 102 N. C. 465; *Thompson v Ewing*, 1 Brewst. (Pa.) 67; *Juker v Comm.*, 20 Pa. St. 484; *Trimmier v Bomar*, 20 S. C. 354; *Fowler v State*, 68 Tex. 30; *State v Goowin*, 69 Tex. 55.

² *Varney v Justice*, 86 Ky. 596; *Pratt v Swanton*, 15 Vt. 147. See also, *Dickey v Hurlburt*, 5 Cal. 343; *In re Melvin*, 68 Pa. St. 333.

³ *Cleland v Porter*, 74 Ill. 76.

afterwards received might have changed the result.' In New York it has been held that a provision of the statute that the polls shall close at 4 o'clock P. M. is constitutional; that if voters are at that hour in the line, and attempting to reach the polls, their votes are lost; and that a mandamus to extend the time will not be granted.² The designation in the constitution of New York of the "annual town meeting," as the time when justices of the peace are to be elected, is equivalent to a prohibition against electing them at any other time; and while the legislature has the power to change the time for holding the town meeting, it cannot prohibit the election of justices of the peace at the town meeting, nor provide for their election at any other time. Therefore a statute, providing that justices of the peace shall be elected at the general election, next succeeding the town meeting, is unconstitutional; and a repealing clause in such a statute does not affect the former statutes for the election of justices; and as far as it purports so to do, it is void.³

§ 149. **The same subject; instances of exceptions under special circumstances.**—So, as a general rule, an election is not valid, unless it was held at the place or places designated by statute, or by public authorities acting in pursuance of a statute.⁴ But it has been held that where the electors and the election officers are

¹ *Piatt v People*, 29 Ill. 54. But where the polls were closed before the designated time, and a sufficient number of votes to have changed the result, were offered afterwards, and before the expiration of the designated time, it was held that the election was void. *State v Wollem*, 37 Iowa 131. It has been also held, that a statutory direction to close the polls at sunset is only directory. *Swepton v Barton*, 39 Ark. 549, citing *Holland v Davies*, 36 Ark. 446.

² *In re Smith*, 3 N. Y. Supp. 107; 18 N. Y. St. Rep. 785.

³ *People v Schiellein*, 95 N. Y. 124. Accord, in principle, *Ex parte Quackenbush*, 2 Hill (N. Y.) 369;

Gerarty v Reid, 78 N. Y. 64.

See also *People v Keeler*, 17 N. Y. 370; *People v Bull*, 46 N. Y. 57.

⁴ *In re Melvin*, 68 Pa. St. 333.

Accord, *Dickey v Hurlburt*, 5 Cal. 343; *Knowles v Yeates*, 31 Cal. 82;

Walker v Sanford, 78 Ga. 165;

State v Calvert, 98 N. C. 580, at p. 586.

assembled at the place thus designated, the electors, by a majority vote, may adjourn to some other place, if a sufficient reason exists, making public announcement thereof, and causing the voters to be notified; and that the election held at such adjourned place will be valid. Among the reasons which have been deemed sufficient for making such an adjournment, are the small size of and difficulty of access to the room at which the election has been called;¹ or the destruction of the building in which the election was appointed to be held.² So where a body of men, on the night before the election, took possession of the polling place, and, in the morning, prevented their political opponents from participating in the choice of the officers of the election; it was held that this was "a fraudulent organization of the poll," and that the voters generally were justified in selecting as the polling place, a wagon drawn up near the original polling place.³ So an adjournment to accommodate a larger number of voters;⁴ or because the proprietor of the building, originally designated as the polling place, refused to allow the election to be held therein; has been deemed to have been made for sufficient cause.⁵ So where the election officers had designated only one polling place, although the town had been divided into two districts.⁶ Where the partisans of a particular candidate drove voters away from the polling place; but the votes of the latter were received at the back door, and counted; it was held, upon information in the nature of a quo warranto, that such votes were properly counted.⁷ It has been held that in case of an adjournment, the adjournment must be to some place

¹ *Brodhead v Milwaukee*, 19 Wis. 624.

³ *State v County Com'rs*, 36 Kan. 236.

² *In re Melvin*, 68 Pa. St., 333, per Thompson, Ch. J., p. 338. But it is said, that in such a case the election must be held "on the same or contiguous ground."

⁴ *Farrington v Turner*, 53 Mich. 27.

⁵ *Dale v Irwin*, 78 Ill. 170.

⁶ *Simons v People*, 119 Ill. 617.

⁷ *Soucy v People*, 113 Ill. 109.

within reasonable distance of the polling place originally designated. Whether the place of adjournment answers that requirement, depends, in each case, upon the particular circumstances thereof.¹

§ 150. **When notice of time and place essential.**—In each of the states, the statutes regulating elections prescribe a certain notice to be given by a particular officer, where the election is general, and in most cases, also where it is special or local. If the statutory notice has not been given, or has not been given as prescribed by the statute, or the notice was substantially defective, and the election was held at a time and place fixed by law, it is nevertheless lawful; but if the time or place is not prescribed by statute, but is to be fixed by the notice, the notice required is essential to the validity of the election. “Time and place are generally essential; but many of the details as to the conduct of elections are usually regarded as directory.”² The reason for this rule has

¹ Where the place of adjournment was several miles distant from the original place, it seems that the adjournment will vitiate the election. *Knowles v Yeates*, 31 Cal. 82. But in one case an adjournment to a place eight miles distant was sustained. *Farrington v Turner*, 53 Mich. 27.

² *Dillon on Mun. Corp.*, 4th ed., § 197 (*136);

Cooley Const. Lim., 5th ed., 758, 759 (*603);

People v Brenham, 3 Cal. 477;

Dickey v Hurlburt, 5 Cal. 343;

Kenfield v Erwin, 52 Cal. 164;

Page v Sup'rs, 85 Cal. 50;

People v Gunn, 85 Cal. 238;

People v Fairbury, 51 Ill. 149;

Stephens v People, 89 Ill. 337;

Carson v McPhetridge, 15 Ind. 327;

State v Jones, 19 Ind. 356;

Gass v State, 34 Ind. 425;

La Fayette v State, 69 Ind. 218;

Dishon v Smith, 10 Iowa 212;

Jones v State, 1 Kan. 273;

Wood v Bartling, 16 Kan. 109;

Jones v Gridley, 20 Kan. 584;

Toney v Harris, 3 S. W. (Ky.) 614;

Comm. v Smith, 132 Mass. 289;

People v Hartwell, 12 Mich. 508;

People v Knight, 13 Mich. 424;

People v Witherell, 14 Mich. 48;

Secord v Foutch, 44 Mich. 89;

Morgan v Gloucester, 44 N. J. L. 137;

State v Goetze, 22 Wis. 363.

With respect to the necessity and regularity of notice, where the election is special, or is to be held only upon a contingency, see

People v Porter, 6 Cal. 26;

People v Weller, 11 Cal. 49;

People v Martin, 12 Cal. 409;

People v Rosborough, 14 Cal. 180;

Kenfield v Irwin, 52 Cal. 164;

Jones v State, 1 Kan. 273;

Gossard v Vaught, 10 Kan. 162;

Secord v Foutch, 44 Mich. 89;

State v Good, 41 N. J. L. 296;

been thus stated : “ Where the object of the election, and the time and place for holding the same, are all fixed by law, there the election is valid, although a notice required by law may not be given. In such a case the electors are presumed to know the law. They are presumed to know what is to be done at the election, and the time and place of holding the same, because these are all fixed by law. Where the time and place of holding the election are to be designated by some board or person, as in this case, and are not fixed by law, then the notice required by law must be given; and if the time designated be so near in the future that legal notice cannot be given, then the election must be held to be void.”¹

§ 151. **Instances of invalid elections for want of notice.**—

It was held in Ohio, that when a vacancy is about to occur in the office of probate judge, by reason of the expiration of the incumbent's term of office, and the sheriff, in publishing the notice required by statute for a general annual election, enumerating the officers to be chosen, omits all mention of the office of probate judge; by reason whereof, the great body of the electors are misled, and have no notice, official or in fact, of an election to fill that office; but nevertheless a small number of the electors, less than one fourth of the whole number of voters at that election, cast their votes for a single candidate, and no votes are cast for any other; such attempted election is irregular and invalid.² But in Georgia, where a statute gave the municipal council power to order an election for mayor, “by giving at least ten days notice in any one or more of the city

Morgan v Gloucester, 44 N. J. L. 137;
People v Crissey, 91 N. Y. 616;
Haddox v Clarke County, 79 Va. 677;
Hubbard v Williamstown, 61 Wis. 397.

¹ *George v Oxford*, 16 Kan. 72, per Valentine, J., p. 80.

² *Foster v Scarff*, 15 Ohio St. 532.
Accord, *Wood v Bartling*, 16 Kan. 109;
State v Goetze, 22 Wis. 363, per Paine, J., pp. 368, 369.
See also *State v Good*, 41 N. J. L. 296;
Toney v Harris, 3 S. W. Rep. (Ky.) 614.

papers;" and the council ordered the publication of the notice in two specified papers, in one of which it was correctly and regularly published, but in the other the notice was published for eight days only, and with the year stated as 1809 instead of 1890; for which reason, on the day before the election, the council revoked the order for the election, but the election was nevertheless held at the appointed time; it was determined that the election was valid, and the person chosen thereat was entitled to the office.¹

§ 152. **Instances of valid and invalid elections when notice was not given.**—The constitution of New York provided that where the office of a justice of the supreme court became vacant, before the expiration of his term of office, the vacancy should be filled by the electors of the judicial district at the next general election of judges. A justice of the supreme court, whose term of office would not have expired for several years, died, thirteen days before a general election of judges was to be held, and after the publication of the official notice of the election. No notice of an election to fill the vacancy was consequently given. But the different political parties nominated candidates for the office, who received a large proportion of the total number of votes cast at the election; and the court of appeals held that the election was valid, and the candidate having the majority of votes was duly elected.² In a subsequent case in the same court, this case was considered, and the court commented upon it as follows: "There an authority stood behind the election and commanded it, and no less an authority than the constitution itself. And there, too, the existence of the vacancy was publicly known; conventions made their nominations; and fifty thousand votes were cast.

¹ *Waycross v Youmans*, 85 Ga. 708.

adversely in *People v Weller*, 11 Cal.

² *People v Cowles*, 13 N.Y. 350; criticized

49.

There was no trace of artifice or fraud, and no defect, except the formal one of no notice by the secretary of state, which, in that instance, it was impossible to give according to law." And in the case before the court, where a person claiming to have been elected alderman of a city at a previous election, resigned on the day before the election, and fifty-five votes were cast for him as alderman "to fill vacancy," and no votes were cast for any other person, the court held that it was "a misnomer to call such a proceeding an election; it was a nullity."¹ In Indiana, where a statute provided that certain vacancies should be filled at the annual general election, and the same statute prescribed the notice to be given of the general election, it was held that if a vacancy occurred within so short a time before the annual general election, that the notice could not be given as required, the vacancy could not lawfully be filled at such election.² And in Arkansas, it has been held, that the failure of the sheriff to publish, as required by the statute, notice of a special election, did not invalidate the election, where a notice was posted, and it was generally known that the election was to be held, and the only newspaper in the county was issued irregularly.³

VI. General powers and duties of inspectors or judges of election, and of canvassers.

§ 153. **Duties of judges and inspectors of election are ministerial.**—It is well settled, by numerous decisions, that inspectors or judges of election perform merely ministerial duties; that they have no power to reject a vote offered, except as the statute expressly empowers them so to do; and even where their decision is

¹ *People v Crissey*, 91 N. Y. 616, per Finch, J., p. 635, citing *Foster v Scarff*, 15 Ohio St. 532, and other cases cited in

the note to the last section.

² *Beal v Ray*, 17 Ind. 554.

³ *Wheat v Smith*, 50 Ark. 266.

final, for the purposes of the polling, as to whether a vote shall be received or rejected, it is not final for the purpose of an action to test the validity of the claim, or of an action by a qualified voter to recover damages against them for rejecting his vote.¹ It is not inconsistent with this doctrine, that inspectors have power, and it is their duty, to decide in each instance, whether the voter, if he is challenged, possesses the requisite qualifications, because, as we shall show when we come to the examination of the nature and extent of official powers, a merely ministerial officer is often required to pass upon similar questions.² But they have no power to decide whether the person offering a vote falsely personates a registered voter.³

§ 154. **When inspectors have or have not power to decide as to qualifications.**—In the state of New York, the courts have construed the statutes relating to the powers and duties of inspectors of election, where a vote is challenged, as meaning, that where the inspectors have administered “the preliminary oath,” so called, under which the person challenged is required to answer specifically questions put to him respecting his qualifications, the inspectors must decide, upon his answers whether he possesses the requisite qualifications; and if they reject his vote, he may take the general oath; whereupon his vote must be accepted, whatever the

¹ *State v Robb*, 17 Ind. 536;
Jenkins v Waldron, 11 Johns. (N. Y.) 114;
Gottcheus v Mathewson, 61 N. Y. 420,
 rev'g 5 Lans. (N. Y.) 214; 58 Barb.
 (N. Y.) 152;
People v Pease, 27 N. Y. 45, aff'g 30 Barb.
 (N. Y.) 588;
People v Bell, 54 Hun (N. Y.) 567; aff'd
 119 N. Y. 175;

Huber v Relly, 53 Pa. St. 112;
Gillespie v Palmer, 20 Wis. 544.
 See also, *Ashby v White*, 2 Ld. Ray.
 938; 1 Bro. Parl. Cas. 45, 1st ed.; and
 parallel rulings, respecting canvass-
 ers. *post*, §§ 156-159.

² *Post*, §§ 543-541.

³ *People v Bell*, 119 N. Y. 175, aff'g 54
 Hun (N. Y.) 567.

inspectors may know respecting the truth thereof.¹ A recent adjudication of the court of appeals of that state will illustrate the power of the inspectors, to pass upon the facts disclosed by the preliminary oath, and the effect of their decision thereupon. In an action brought against the inspectors of election at a town meeting, held in the town of B., to recover damages for rejecting the plaintiff's vote, the question arose whether the plaintiff was a resident of that town. The constitution of the state provides that, for the purpose of voting, "no person shall be deemed to have gained or lost a residence, while kept in any almshouse or other asylum at public expense." The plaintiff, having offered his vote, and the vote having been challenged, made oath that he was a resident of the town; that he had been admitted as an inmate of the New York Soldiers' and Sailors' Home in the town, and intended to make that his residence, as long as he was permitted to remain an inmate of such Home; that when he was admitted he was a resident of the city of New York; and on becoming an inmate of the institution he intended to change his residence to the town. The court of appeals held that the Home was an asylum, within the provision of the constitution, wherein the plaintiff was maintained at the public expense; that the plaintiff's statements, respecting his residence in the town, could be accepted only as conclusions from the circumstances detailed in connection therewith; and added: "They were his conclusions; and defendants, in view of his whole statement, were not bound by them. They were bound by the facts stated, and were required to say, upon those facts, whether the plaintiff was qualified in the necessary particular; and undoubtedly they were to determine the question at their peril. . . . The decision

¹ *People v Pease*, 27 N.Y. 45, aff'g 30 Barb. (N. Y.) 538. See per Davies, J., pp. 53, 54; per Selden, J., pp. 65 to 67.

See also *People v Bell*, 119 N. Y. 175, aff'g 54 Hun (N. Y.) 567.

of the inspectors of election was, that, in their opinion, the intending voter was in B. as a mere inmate of the institution, and for a temporary purpose; and not as a resident of the voting district, or with intent to make the town a fixed or permanent place of residence; and so it would seem." The court therefore held that the action could not be maintained.¹ Where a voter has given in his ballot, and the same has been deposited in the ballot box, it has passed beyond the control of the inspectors and the voter, and cannot be withdrawn by consent of all.²

§ 155. **After board has made count and statement it is *functus officio*.**—After the board of inspectors or of judges of election has counted the votes, and certified to the count, it is *functus officio*, and the members cannot reassemble and recount the votes, unless the statute expressly empowers them so to do.³ So, after their return has been filed, a mandamus will not lie to compel them to make a corrected or amended return, or to canvass the ballots.⁴ Nor can they affect their return by a subsequent statement to the board of canvassers.⁵ And inspectors of election cannot consider the constitutionality of the statute providing for the election, or the legality of the election thereunder, as a reason for not performing their duty.⁶

§ 156. **Powers of canvassers, and remedy to compel action.**—In like manner the canvassers, whose duty it is

¹ *Silvey v Lindsay*, 107 N. Y. 55, rev'g 42 Hun (N. Y.) 116.

² *Harbaugh v Cicott*, 33 Mich. 241;
Hartt v Harvey, 32 Barb. (N. Y.) 55.

³ *State v Donnewirth*, 21 Ohio St. 216.
See also, *Ramsay v Callaway*, 15 La. Ann. 464.

⁴ *People v Reardon*, 49 Hun (N. Y.) 425.
See also *State v Elkinton*, 30 N. J. L. 335;

People v Supervisors, 12 Barb. (N. Y.) 217; 15 Barb. (N. Y.) 607;

Hadley v Mayor, etc., 33 N. Y. 603;
Secretary v McGarrahan, 9 Wall. (U. S.) 298;

United States v Boutwell, 17 Wall. (U. S.) 604.

People v County Canvassers, 46 Hun (N. Y.) 390; 20 Abb. N. C. (N. Y.) 19.

⁶ *Franklin Co. v State*, 24 Fla. 55.

to canvass the votes upon the inspectors' returns, and thereupon to declare the result, exercise ministerial, not judicial duties, and they cannot go back of the returns to sift out unlawful votes, or to decide upon questions of fraud, intimidation, corruption, or the like; but they are bound to act upon the returns of the inspectors, certified and transmitted to them according to law.' The same rule applies to a justice of the peace, making a recount of votes under a statute, who has no power to take evidence as to whether the ballot boxes have been tampered with.' But the canvassers have the power, and are required, as matter of duty, to determine whether the

¹ *Leigh v State*, 69 Ala. 261;
Howard v McDiarmid, 26 Ark. 100,
Patton v Coates, 41 Ark. 111.
Pacheco v Beck, 52 Cal. 3.
State v State Canvassers, 17 Fla. 29;
People v Kilduff, 15 Ill. 492.
People v Warfield, 20 Ill. 159;
People v Hilliard, 29 Ill. 413;
Brower v O'Brien, 2 Ind. 423.
Kisler v Cameron, 39 Ind. 488;
Moore v Kessler, 59 Ind. 152;
State v Marshall Co. Judge, 7 Iowa 186;
Dishon v Smith, 10 Iowa 212;
State v Cavers, 22 Iowa 343;
State v Lawrence, 3 Kan. 95;
Rice v Stevens, 25 Kan. 302;
Clark v McKenzie, 7 Bush (Ky.) 523;
Bacon v County Canvassers, 26 Me. 491;
Op'n of the Just., 64 Me. 596;
Prince v Skillin, 71 Me. 361;
Clark v County Exam'rs, 126 Mass. 282;
People v Tisdale, 1 Dougl. (Mich.) 59;
People v Van Cleve, 1 Mich. 362;
People v Cicott, 16 Mich. 283;
O'Ferrall v Colby, 2 Minn. 180;
Taylor v Taylor, 10 Minn. 107;
State v Harrison, 38 Mo. 540;
State v Rodman, 43 Mo. 256;
State v Steers, 44 Mo. 223;
State v Townsley, 56 Mo. 107;
State v Trigg, 72 Mo. 365;
Chumasero v Potts, 2 Monta. 242;

State v Ramsay, 8 Nebr. 286;
State v Hill, 10 Nebr. 58;
State v Stearns, 11 Nebr. 104;
State v Peacock, 15 Nebr. 442;
State v Hill, 20 Nebr. 119;
State v Wilson, 24 Nebr. 139;
Op'n of the Justices, 58 N. H. 621;
Osgood v Jones, 60 N. H. 282;
State v Governor, 25 N. J. L. 331;
People v Van Slyck, 4 Cow. (N. Y.) 297;
Ex parte Heath, 3 Hill (N. Y.) 42;
Morgan v Quackenbush, 22 Barb. (N. Y.) 72;
Kortz v County Canvassers, 12 Abb. N. C. (N. Y.) 84;
People v County Canvassers, 12 Abb. N. C. (N. Y.) 77; 64 How. Pr. (N. Y.) 334;
People v Cook, 8 N. Y. 67;
People v County Canvassers, 54 Hun (N. Y.) 595;
Peebles v County Com'rs, 82 N. C. 385;
State v Boone, 98 N. C. 573;
State v Calvert, 98 N. C. 580;
Dalton v State, 43 Ohio St. 652;
Comm. v Emminger, 74 Pa. St. 479;
State v Charleston, 1 S. C. 30;
State v Hayne, 8 S. C. 367;
Maxwell v Tolly, 26 S. C. 77;
Ex parte Elliott, 33 S. C. 602;
Att'y Genl. v Barstow, 4 Wis. 567, at p 749.

**State v Frambach*, 47 N. J. L. 85.

returns are regular upon the face thereof; and they may reject any returns for a substantial irregularity thus appearing.¹ But matter, appearing upon the face of the returns, for which the statute does not provide, must be disregarded as surplusage.²

§ 157. **The same subject.**—Where a majority only of the inspectors have signed the returns, the canvassers must canvass the vote according to the returns so signed; leaving the question, whether the person who receives their certificate is duly elected, to be determined by the courts in a subsequent litigation; and they may be compelled by mandamus to canvass the votes accordingly; and this duty cannot be evaded by them by refusing to meet, or by adjourning, or otherwise failing to act, for all such breaches of duty will lay the foundation of a mandamus;³ subject of course to the rule that a mandamus is discretionary, and will not be granted where it would be nugatory, and the other rules which regulate that writ.⁴ A board of canvassers may act through a committee of its own members, the report of the committee being rati-

¹ *Hudmon v Slaughter*, 70 Ala. 546;
Patton v Coates, 41 Ark. 111;
Brown v County Com'rs, 38 Kan. 436;
O'Ferrall v Colby, 2 Minn. 180;
Peebles v County Com'rs, 82 N. C. 385;
State v State Canvassers, 36 Wis. 408.
 See also *Lawrence County v Schmaul-*
hausen, 123 Ill. 321.

² *Ex parte Heath*, 3 Hill (N. Y.) 42.

³ *Att'y Genl. v Board of Canvassers*, 64 Mich. 607;
People v Reardon, 49 Hun (N. Y.) 425.
 See further, as to the remedy by mandamus in election cases, *Magee v Sup'rs*, 10 Cal. 376; *State v Gibbs*, 13 Fla. 55; *Kisler v Cameron*, 39 Ind. 488; *State v Marshall County Judge*, 7 Iowa 186; *Lewis v County Com'rs*, 16 Kan. 102; *Peters v State Canvas-*

sers, 17 Kan. 365; *State v County Com'rs*, 23 Kan. 264; *Lindsey v Auditor*, 3 Bush (Ky.) 231; *Clark v McKenzie*, 7 Bush (Ky.) 523; *Luce v Mayhew*, 13 Gray (Mass.) 83; *State v Hill*, 10 Nebr. 58; *People v County Canvassers*, 54 Hun (N. Y.) 595; *Comm. v Emminger*, 74 Pa. St. 479; *Ex parte Elliott*, 33 S. C. 602; *Burke v Sup'rs*, 4 W. Va. 371.

⁴ *State v Stevens*, 23 Kan. 456;
Clark v Buchanan, 2 Minn. 346;
State v Rodman, 43 Mo. 256;
State v Whittemore, 11 Nebr. 175;
People v Sup'rs, 12 Barb. (N. Y.) 217;
State v Randall, 35 Ohio St. 64.

fied by the full board;¹ but having once met and completed the canvass, and certified to the result, the members cannot again, without express authority of law, meet as a board to recanvass the votes, and make another decision.² Where a statute requires the county clerk to "cast up the vote" at a "local option" election, within five days after the close of the election, if he fails so to do within the time specified, that will not relieve him of his duty, or render his action unauthorized, and a mandamus will go to compel him to cast up the vote after the expiration of the time.³

§ 158. **The same subject; allowance of imperfect or defective ballots.**—It follows, from the rules already stated, that canvassers cannot allow a ballot to a person, whose name is insufficiently given therein, upon their own judgment, and still less upon extrinsic proof, that the voter intended to vote for the person thus insufficiently designated. For instance, they cannot allow Andrew H. Getty votes cast for Andrew C. Getty;⁴ nor to William H. Smith votes for W. H. Smith or W. Smith;⁵ nor to Leonard Clark votes cast for "L. Clark."⁶ But a mandamus to canvassers to compel them to count for different persons, votes returned for "Mathew Ryan," "Mattius Ryan" and "M. Ryan" was denied, because it was not shown that these were, in fact, the names of

¹ *Rigsbee v Durham*, 98 N. C. 81.

² *Op'n of the Just.*, 117 Mass. 599;
People v Robertson, 27 Mich. 116;
State v Harrison, 38 Mo. 540;
Bowen v Hixon, 45 Mo. 340;
People v Sup'rs, 12 Barb. (N. Y.) 217;
Hadley v Albany, 33 N. Y. 603;
State v Wilson, 24 Nebr. 139;
Ingerson v Berry, 14 Ohio St. 315;
State v Donnewirth, 21 Ohio St. 216.
 See also the preceding sections as to inspectors.

³ *State v Ringo*, 42 Mo. App. 115.

⁴ *Kortz v County Canvassers*, 12 Abb. N. C. (N. Y.) 84.

⁵ *Op'n of the Just.*, 64 Me. 596.

⁶ *Clark v Co. Exam'rs*, 126 Mass. 282;
People v Tisdale, 1 Dougl. (Mich.) 59;
Op'n of the Just., 38 Me. 597.
 In *People v Cicott*, 16 Mich. 283, Campbell, J., says that inspectors or canvassers have no power to make inquiry into the identity of initials with a persons full name; if this is done at all, it must be done by the courts. See p. 308.

different persons.¹ But it seems that the same strictness is not required, with respect to the designation of the title of the office, as with respect to the candidate's name; and that canvassers may disregard slight variations from the correct legal designation, if the intent of the voter is clearly apparent. Thus a mandamus was granted to compel canvassers to count ballots containing the words "For Congress" for a candidate for representative in congress.² In other cases are to be found intimations that canvassers must disregard similar errors.³ Where a name on a printed ballot is erased, although imperfectly, and another name is written in its place, or the printed name is covered, although partially, by a "paster" containing another name, and the voter's intention to obliterate the first name is manifest, upon inspection of the ballot; it seems that the inspectors or canvassers may properly allow the vote to the person, whose name was thus subsequently placed on the ballot; but where the other name is not obliterated, or the obliteration is so imperfect that the other name appears plainly upon the ballot, the ballot must be rejected, by the canvassers, as containing two names for the same office.⁴

§ 159. Remedy after rejection of ballots by canvassers; effect of their certificate.—Where the canvassers have

¹ *State v Williams*, 95 Mo. 159.
Accord, *State v Foster*, 38 Ohio St. 599.

² *State v Berg*, 76 Mo. 136.

³ *People v Matteson*, 17 Ill. 167;
State v Mechem, 31 Kan. 435.

Most of the cases arose upon information in the nature of a quo warranto, or a statutory substitute for such an information; and the most that can be said is that the court, in deciding that such errors must be disregarded, uses language which appears to indicate that the canvassers might have done so.

See *Inglis v Shepherd*, 67 Cal. 469;
Detroit, etc., R. R. Comp'y v Bearss,
 39 Ind. 598;

Clark v Com'rs, 33 Kan. 202;
Applegate v Eagan, 74 Mo. 258;
People v McManus, 34 Barb. (N.Y.) 620;
State v Elwood, 12 Wis. 551.

So as to the omission of the word "For," preceding the designation of the office. *People v Cicott*, 16 Mich. 283.

⁴ *Kreitz v Behrensmeyer*, 125 Ill. 141;
People v Cicott, 16 Mich. 283;
People v Robertson, 27 Mich. 116;
Newton v Newell, 28 Minn. 529.

rejected ballots for the defects mentioned in the last section, and the intent of the voters was clear, the defeated candidate, for whom they were intended, has a remedy by an information in the nature of a quo warranto, or other statutory substitute for it, to test the title to the office.¹ In such a proceeding, the certificate of the canvassers of the result, although it is, for other purposes, conclusive,² is only *prima facie* evidence, even where a statute declares it to be conclusive evidence of the title to the office of the person named therein. And the contesting party may consequently go back of it, in order to ascertain the real facts of the case.³

VII. Rules which govern, in the absence of a constitutional or statutory regulation, where the successful candidate at an election cannot lawfully hold the office.

§ 160. **English rule as to the validity of a vote.**—We have considered, in a former chapter,⁴ the rules of law respecting the eligibility of a person to a public office: we are now to consider the rules where an ineligible person receives a majority of votes cast at a popular election. In England, under the system of elections which existed there until a very recent time, whereby binding

¹ See *ante*, § 145.

² *Prettyman v Sup'rs*, 19 Ill. 406;
People v Pease, 27 N. Y. 45.
 See also *McCrary on Elections*, § 382;
Paine on Elections, § 625, and cases cited.

³ *People v Seaman*, 5 Denio (N. Y.) 409.
 See also cases cited in § 145, *ante*; and
Rex v Vice-Ch'r, etc., of Cambridge,
 3 Burr. 1647;
Echols v State, 56 Ala. 131;
People v Jones, 20 Cala. 50;
People v Kilduff, 15 Ill. 492;
People v Matteson, 17 Ill. 167;

Winter v Thistlewood, 101 Ill. 450;
Dishon v Smith, 10 Iowa 212;
Comm. v Jones, 10 Bush (Ky.) 725;
Newcum v Kirtley, 13 B. Mon. (Ky.) 515;
Prince v Skillin, 71 Me. 361;
People v Van Cleve, 1 Mich. 362;
State v Justices, 1 N. J. L. 244;
State v Passaic, 25 N. J. L. 354;
People v Van Slyck, 4 Cow. (N. Y.) 297;
Hill v Hill, 4 McCord (S. C.) 277;
Att'y Gen'l v Barstow, 4 Wis. 567;
State v Fetter, 12 Wis. 566;
State v Avery, 14 Wis. 122.

⁴ *Ante*, ch. 7.

nominations were made before the election; the voting was *viva voce*; the polls were often held open for several days; and the electors, being subject to a property qualification, were comparatively few in number; the rule has been established, that if the fact of the disqualification of a particular candidate was known to an elector, in season to enable him to vote for another candidate, but he nevertheless voted for the disqualified person, he is deemed to have wilfully thrown away his vote; and his vote is consequently a nullity; so that, if the votes thus deemed nullities are sufficient in number, to more than exhaust the majority or plurality of the ineligible candidate, the candidate receiving the next highest number of votes, and who is eligible, is declared to be elected. But if the elector was ignorant of the fact that the candidate was ineligible, his vote is not regarded as thrown away, but is to be counted; and if the result is to retain the majority or plurality of the ineligible candidate, the election has failed, and there must be a new election.¹ And the same rule has been followed in Ireland.² It has also been held, that knowledge of the fact, which creates in law a disqualification, does not involve knowledge that the candidate is legally disqualified.³

§ 161. **American cases following the English rule.**—Some of the American authorities have followed these rulings, and have extended them even further, in the

¹ Reg. v Tewkesbury, 3 L. R., Q. B., 629;
37 L. J., Q. B., 288; 18 L. T. 851; 16 W.
R. 1200; 9 B. & S. 683;

Gosling v Veley, 7 Ad. & Ell., N. S.
406; 4 H. L. Cas. 679; 1 C. L. R. 950;
17 Jur. 939.

See also Rex v Foxcroft, 2 Burr. 1017;

Rex v Monday, 2 Cowp. 530;

Rex v Hawkins, 10 East 211;

Rex v Parry, 14 East 549;

Claridge v Evelyn, 5 Barn. & Ald. 81;

Rex v Bridge, 1 Maule & S. 76;

Reg. v Coaks, 3 El. & Bl. 249; 2 C. L. R.
947; 23 L. J., Q. B., 133; 18 Jur. 378.

² *In re* Tipperary Elec., 9 Ir. R., C. L., 217.
See also Reg. v Franklin, 6 Ir. R., C. L.,
239;

Trench v Nolan, 6 Ir. R., C. L., 464; 20
W. R. 833; 27 L. T. Rep., 69.

³ Reg. v Tewkesbury, *supra*; Gosling v
Veley, *supra*.

direction of annulling votes for an unqualified person. Thus it has been held in Indiana, that the question whether such a vote is to be deemed a nullity, depends upon either actual knowledge; by the voter of the candidate's ineligibility, or the existence of facts which charge him with knowledge, and if the votes for the ineligible candidate, cast by those who knew, or were bound to know, that he was ineligible, will exhaust his majority, the next highest eligible candidate is elected. Thus, if the disqualification results from the fact that the candidate held another public office, which is made a disqualification by the constitution; all the voters within the district to which that office pertains, are chargeable with knowledge of his ineligibility, and their votes for him are void.¹ And substantially the same ruling was made at *nisi prius* in Maryland.²

§ 162. **The same.**—In New York, rulings, substantially in conformity to those in England, were made in a case where the statutes, relating to the officers of a city, were construed to mean, that a supervisor of a ward of the city was not eligible to the office of superintendent of the poor. In that case a person, holding the office of supervisor, was elected superintendent of the poor, and resigned his office of supervisor, after the election, and before the commencement of his term of office as superintendent of the poor. Whereupon he was declared duly elected to the latter office; and filed his oath of office and his official bond, and entered upon the discharge of the duties of the office. The next highest candidate also filed an official oath and bond; and an action in the nature of a quo warranto was brought by him, as relator, to oust the other from the office, and to put the relator into posses-

¹ *Gulick v New*, 14 Ind. 93.
Accord, in principle, *Carson v McPhet-*
ridge, 15 Ind. 327.

² *Hatcheson v Tilden*, 4 Harr. & McH.
(Md.) 279.

sion. The court of appeals held that the defendant was ineligible, and had not entitled himself to hold the office by resigning his office as supervisor; that judgment of ouster must consequently pass against him; but that the relator was not entitled to the office, and the office was vacant. It was insisted, in behalf of the relator, that all the votes for the defendant, cast in the ward for which he was supervisor, must be deemed nullities; the effect of which would have been to cancel the defendant's majority. Upon this branch of the case, the court, after fully examining the English and American authorities, said: "We think that the rule is this: the existence of the fact which disqualifies, and of the law which makes that fact operate to disqualify, must be brought home so closely and so clearly to the knowledge and notice of the elector, as that to give his vote therewith indicates an intent to waste it. The knowledge must be such, or the notice brought so home, as to imply a wilfulness in acting, when action is in opposition to the natural impulse to save the vote, and make it effectual. He must act so in defiance of both the law and the fact, and so in opposition to his own better knowledge, that he has no right to complain of the loss of his franchise, the exercise of which he has wantonly misapplied." And, inasmuch as there was no proof of actual notice of the defendant's ineligibility, nor of any facts from which notice could be implied, save that he was a supervisor; it was held that the votes in question could not be treated as nullities, and that the election had failed.¹

§ 163. **The American rule, as established by weight of authority.**—But most of the American courts ignore the

¹ *People v Clute*, 50 N. Y. 451, rev'g 63 Barb. (N. Y.) 356, and aff'g 12 Abb. Pr. N. S. (N. Y.) 399.

In *State v Tierney*, 23 Wis. 430, it was held that where two persons were to

be elected to the same office, a ballot cast for three persons could not be counted, although one of the three was ineligible.

distinction between knowledge and want of knowledge of the disqualification. A learned and distinguished writer says on this subject: "The choice of a disqualified person is ineffectual. Thus, if the law requires freeholders to be chosen for certain officers, the election of a person not a freeholder is void. But unless the votes for an ineligible person are expressly declared to be void, the effect of such a person receiving a majority of the votes cast, is, according to the weight of American authority, and the reason of the matter (in view of our mode of election, without previous binding nominations, by secret ballot, leaving each elector to vote for whomsoever he pleases), that a new election must be held, and not to give the office to the qualified person having the next highest number of votes." ¹ And in a recent case, this doctrine is laid down in more forcible terms, as follows: "In England, it has been held that where electors have personal and direct knowledge of the ineligibility of the majority candidate, the votes cast for such candidate are void, and the minority candidate is elected. In this country, the great current of authorities sustains the doctrine that the ineligibility of the majority candidate does not elect the minority candidate; and this without reference to the question as to whether the voters knew of the ineligibility of the candidate for whom they voted. It is considered that in such a case the votes for the ineligible candidate are not void." ² Other cases in the United States sustaining the same doctrine are cited in the note. ³ But where the con-

¹ Dillon on Mun. Corp. 4th ed., § 196 (*135), citing *State v Swearingen*, 12 Ga. 23; *Sublett v Bedwell*, 47 Miss. 266; 12 Am. R. 338; *State v Giles*, 1 Chand. (Wis.) 112; *State v Smith*, 11 Wis. 65; *Saunders v Haynes*, 13 Cala. 145; *State v Gastinel*, 20 La. Ann. 114; *Cooley Const. Lim.*, 620; *Comm. v*

Cluley, 56 Pa. St. 270; *People v Clute*, 50 N. Y. 451; *Wood v Bartling*, 16 Kan. 109, 114.

² *Privett v Bickford*, 26 Kan. 52, per *Horton*, Ch. J., pp. 57, 58.

³ See the cases cited in note 1; also *Crawford v Dunbar*, 52 Cala. 36; *Op'n*

stitution declares that votes cast for one who has refused to take the oath of loyalty are void; votes for such a person cannot be counted, and are treated as nugatory.¹ It has been held that the death of the successful candidate, before the opening of the polls, did not entitle the next highest candidate to the office, although it was known to the voters.²

of the Just., 38 Me. 597; *People v Molitor*, 23 Mich. 341; *Barnum v Gilman*, 27 Minn. 466; *State v Boal*, 46 Mo. 528; *State v Vail*, 53 Mo. 97; *Hoskins v Brantley*, 57 Miss. 814; *In re Corliss*, 11 R. I. 638; *Dryden v Swin-*

burne, 20 W. Va. 89; *State v Smith*, 14 Wis. 497.

¹ *State v Boal*, 46 Mo. 528.

² *State v Walsh*, 7 Mo. App. 142.

POSTSCRIPT.—While these pages are passing through the press, the court of appeals of New York has decided the important causes in that state, arising under the general election of 1891. In *People ex rel. Nichols v Board of Canvassers of Onondaga County*, the court ruled, that under the "Ballot Reform Act" of 1890, official ballots, indorsed with the wrong number of the election district wherein they were used, must be rejected, although the mistake was made by the county clerk in transmitting the ballots, and the result is to give the office to the minority candidate. In *People ex rel. Sherwood v Board of State Canvassers*, the court ruled, that although the duties of the state board of canvassers are ministerial, and the board has no power to determine whether a candidate is or is not eligible, yet a mandamus will not issue, to compel the board to give a certificate of election to an ineligible candidate, who has received the majority of the votes, because the court will not aid in the accomplishment of an illegality. These adjudications, and others arising out of the same election, were made Dec. 29, 1891, and will probably be contained in 129 or 130 N. Y.

CHAPTER X

ACCEPTANCE OR REFUSAL; PENALTY FOR REFUSAL

CONTENTS

- SEC. 164. Acceptance necessary to vest title to office; what suffices as an acceptance.
165. Refusal to accept an office is punishable by indictment at common law; municipal corporation may also impose penalty for such refusal.
166. Mandamus also lies against person so refusing, although he has paid the penalty; person disqualified not liable to penalty; quere, whether penalty recoverable where no compensation is provided.
167. Statute imposing penalty is constitutional; but ineligibility or holding an incompatible office is a defence; quere, whether, where there is a penalty, person may hold incompatible offices.
168. Officer who resigns, incurs thereby a penalty attached to refusal to serve; where he has paid one penalty, he is not liable to another, for refusing to serve upon reappointment.
169. What suffices as a refusal; it may be treated by appointing power as a forfeiture.

§ 164. **Acceptance necessary to vest title to office ; what suffices as acceptance.**—An appointment or election to an office is insufficient to vest the title to the office in the person chosen, without proof of his acceptance thereof. In general, it is provided by statute that an officer must take an oath of office, before he is invested with the office, and in many cases he is also required to give an official bond; but as we shall see hereafter, an officer frequently becomes possessed *de facto* of an office, although he has failed to take the official oath, or to give the official bond. In such a case, his acts show his accept-

ance. And the acceptance of an office may always be shown by proof of the acts of the person chosen to fill it. As a learned judge has remarked: "On general principles, the choice of a person to fill an office constitutes the essence of his appointment. After the choice, if there be a commission, an oath of office, or any ceremony of inauguration, these are forms only, which may or may not be necessary to the validity of any acts under the appointment, according as usage and positive statute may or may not render them indispensable. But in no case can the office itself be considered as filled, till an acceptance of the appointment by the person chosen. That acceptance, however, need not be signified in express terms. It is often implied from previous conduct, as well as a subsequent receipt of a commission, taking the oath of office, or discharging some of its duties." ¹ Where a statute requires a person elected to a town office to file notice of his acceptance within a specified time, and provides that a failure to file such notice shall be deemed a refusal to serve, such a notice is a substitute for an oath of office; and the filing thereof is essential to render the person an officer *de jure*, although he may become an officer *de facto* without filing it.* Where the acceptance of an office within the time prescribed, is prevented by another's usurpation thereof, the failure seasonably to accept will be excused, and upon ouster of the usurper, the officer elect will be admitted.³

§ 165. **Penalties for refusal to accept office.**—With respect to many offices, chiefly local in their character, it is provided by statute, in England and in the United States, that a person chosen to fill the office is subject to a penalty, if he refuses to accept it. But, apart from such

¹ Johnston v Wilson, 2 N. H. 202, per Woodbury, J.

² Bentley v Phelps, 27 Barb. (N. Y.) 524.

³ Reg. v Coaks, 3 El. & Bl. 249.

See also Smith v Moore, 90 Ind. 294.

a statutory provision, it is an offence at common law for a person chosen to a public office to refuse to serve, even where an official oath and bond are, or either is, requisite to qualify him for so doing. Thus it has been said that "the grant of an office generally may be made to any person whom the king pleases; for the king has an interest in his subject and a right to his service; and therefore an information lies against him who refuses an office, being duly elected; and he shall not be excused for his neglect to qualify himself according to law."¹ So it is well established at common law, that a municipal corporation is entitled to the official services of its members; and therefore that it may impose, by its by-laws or ordinances, a pecuniary penalty upon any of its members who refuses, without sufficient excuse, to serve in an office to which he has been duly chosen.² This rule was declared, and the reasons therefor were very fully set forth by Lord Holt in a case arising under a by-law of the city of London;³ which has been followed by several other cases.⁴ It seems, also, that if the office is of a public character, not only may the penalty be recovered, but the party is also liable to be punished criminally.⁵

§ 166. **The same subject; remedy against person refusing.**—A mandamus will also lie against a member of a municipal corporation, who fails to take an office of a public character to which he has been chosen, as, for instance, the office of mayor;⁶ and this, although he has

¹ Com. Dig., tit. Officer, B 1.
See also *Edwards v United States*, 103 U. S. 471.

² *Dillon on Mun. Corp.*, 4th ed., § 223 (*162.)

³ *City of London v Vanacker*, 1 Ld Raym. 496; 5 Mod. 438; 12 Mod. 270; Carth. 480; Holt, 431; 1 Salk. 142.

⁴ *Anon*, 11 Mod. 132;
Reg. v Hungerford, 11 Mod. 142;
Rex v Grosvenor, 1 Wils. 18; 2 Str. 1193;
Rex v Woodrow, 2 T. R. (D. & E.) 731.

⁵ *Rex v Lone*, 2 Str. 920;
Rex v Jones, 2 Str. 1146;
Rex v Burder, 4 T. R. 778;
Rex v Bower, 1 B. & C. 585;
Rex v Whitwell, 5 T. R. 85.
As to indictment for failing to serve in a parish office, under the stat. of 43 Eliz., see *Rex v Poynder*, 2 D. & R. 258; 1 B. & C. 178.

⁶ *Rex v Mayor*, 4 Dougl. 14;
Rex v Leyland, 3 M. & S. 184.
See also *Reg. v Hungerford*, 11 Mod. 142.

paid the penalty. Thus, where a mandamus was brought to compel the defendant to accept the office of common councilman of a borough, and he had paid the fine for refusal, the court said: "The payment of the fine of 5*l.* does not exempt him from serving the office. The by-law does not say that he shall either pay the fine or serve the office, but if he refuses to serve, he must pay the fine; and he may be mulcted for his contempt, and compelled afterwards by the authority of this court to serve the office. . . . It is an offence at common law for a member of a corporation to refuse to take upon him a corporate office to which he has been appointed. Let a peremptory mandamus go."¹ But it has been held that a person who is disqualified to fill an office is not liable to a penalty or other proceedings, in consequence of his refusal to serve in it.² And a learned judge, in a recent American case, has intimated that a person cannot be compelled to accept an office, for which no compensation is provided by law.³

§ 167. **Constitutionality of statute imposing penalty; defences.**—In a case, which arose in North Carolina, an action was brought to recover a penalty given by a statute, for failure to qualify, and perform the duties of town constable, and the defence was that the statute was in violation of the declaration of rights, contained in the constitution of the state. The court said: "It is a doctrine of the common law that every citizen, in peace as well as in war, owes his services to the state when they are demanded. This right stands on at least as high a necessity as the right of eminent domain, by which a man's property may be taken for public use against his consent." And after citing *City of London v. Vanacker*,

¹ *Rex v Bower*, 2 D. & R. 842; 1 B. & C. 585.

See also *Rex v Lone*, 2 Str. 920;
Rex v Jones, 2 Str. 1148.

² *Reg. v Richmond*, 11 W. R. 65.

³ *Hinze v People*, 92 Ill. 406, per Scholfield, J., p. 424.

1 *Ld. Raym.* 446, and other English authorities the court continued: "It is seen in *Vanacker's case*, that by the by-law of the corporation which imposed the penalty, he was allowed to defend himself 'by any reasonable excuse.' Our statute contains no such provision. Nevertheless it cannot be doubted that the defendant in the present case might have defended himself by any legal excuse; that is by a plea of any matter which legally disqualified him from performing the duties of the office. For example, that he was ineligible, as not being a member of the corporation, or that he already was filling some public office, the duties of which were incompatible with those of town constable, etc."¹ It seems, however, from a case cited in a former chapter, that where a person holding an office is chosen to fill another office, for refusing to serve in which he is liable to a penalty, he may hold both offices, although they are incompatible.² But probably the correct rule is that laid down in the North Carolina case. So it has been held, that where a town brought an action, to recover the statutory penalty for refusing to serve in the office of constable, an answer setting forth that at the same election, at which the defendant was elected constable, he was elected to the office of supervisor, and accepted the latter office, and qualified and entered upon the discharge of the duties thereof, discloses a sufficient defence, and is good upon demurrer, because a citizen, in such a case, will not be compelled to accept both offices.³

§ 168. **Effect of resignation or reappointment; and of paying one penalty.**—And it has been said that the fact that a penalty is imposed by statute for refusing to serve in an office, does not prevent the incumbent from resign-

¹ *London v Headon*, 76 N. C. 72, approving *State v McEntyre*, 3 Ired. (N. C.) 171, per *Ruffin*, Ch. J., p. 175.

See also *Smith v Moore*, 30 Ind. 294.

² *Goettman v Mayor, etc.*, 6 Hun (N. Y.) 132, *ante*, § 32.

³ *Hartford v Bennett*, 10 Ohio St. 441.

ing, but that he incurs the penalty by such resignation.¹ The question whether an officer may resign, without the consent of the appointing power, will be considered in a subsequent chapter.² Where a person has been appointed to an office, for refusal to serve in which a penalty has been attached by statute; and he refuses to serve, and has been sued, or has become liable to be sued for the penalty; he cannot be subjected to another penalty by being reappointed to fill the vacancy occasioned by his own refusal to serve. In a case thus holding, the learned judge, delivering the opinion of the court, said that “the legislature considered the penalty as an equivalent for the service;” a remark which runs counter to the rule that a mandamus will lie to compel the party to serve, although he has paid the penalty.³

§ 169. **What is a refusal; may be a forfeiture.**—A refusal to accept an office may be express, or may be inferred from acts or omissions of the person chosen to fill it; and the authorities empowered to fill a vacancy in the office, may treat the refusal as a forfeiture. These matters will be fully considered in a subsequent chapter.*

¹ *Conner v Mayor, etc.*, 2 Sandf. (N. Y.) 355, per Sandford, J., p. 371.

³ *Haywood v Wheeler*, 11 Johns. (N. Y.) 432.

² *Post*, ch. 17.

⁴ *Post*, §§ 427, 428.

CHAPTER XI

OFFICIAL OATH; OFFICIAL BOND

CONTENTS

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171. Whether officer succeeding *ex officio* to a new office must give new oath and bond; holding office under color of title is evidence that bond and oath have been furnished.

172. Statute fixing time to qualify not applicable to one kept out of office; or where two receive an equal number of votes; or where officer had no notice of his appointment till expiration of time.

173. Such statutes are deemed directory, although they make the failure ground of forfeiture, unless they declare that the failure *ipso facto* forfeits the office; but in some cases a contrary ruling has been made.

174. Various rulings in cases where oath or bond was not furnished within the prescribed statutory time; whether failure to give a bond for one office vacates another, where the former is held *ex officio*.

175. Refusal of approving officer to act is excuse for not seasonably giving bond; but mistake no excuse; officer failing to give oath or bond cannot justify, or have his salary.

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185. Defects in approval; courts liberal in disregarding them; rulings thereupon, and upon acknowledgements.
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187. Courts liberal in disregarding irregularities and defects in official bonds, where not vital, even in proceedings to oust the officer. Numerous cases establishing the general rule.
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189. Where bond is sustained as a common law bond, it must be enforced by common law rules; instances.
190. Rulings in cases where the bond departed from the statute as respects the obligee.
191. The same subject.
192. Rulings in cases where the bond departed from the statute as respects the condition thereof.
193. The same subject.

- SEC. 194. Rulings where the instrument, given as an official bond, was not sealed.
195. Rulings where principal not a party; where names of sureties or principal do not appear in body of bond.
196. Rulings where bond was executed with blanks left, which were afterwards filled up, without parties' assent.
197. Rulings where alteration made in bond or in some of parties, after execution, and without other parties' assent.
198. Rulings where bond varies from statute as to the penalty.
199. Rulings where it is joint, instead of joint and several; where each surety is bound for part only of the penalty; where the bond is executed by less than the number required by the statute.
200. Rulings where a surety is disqualified; where the officer was not appointed at the prescribed term of the court.
201. This subject to be further considered in the next succeeding chapter.

I. General principles; and rulings applicable equally to official oaths and official bonds.

§ 170. **Effect of oath and bond; powers of officer accepting bond or administering oath.**—With few exceptions, every public officer is required by statute to take an official oath, before entering upon the duties of his office. Many officers are also required by statute to furnish official bonds, with sureties; those who receive public money are almost invariably required so to do, for the safety of the public; and those whose powers and duties involve the receipt of money or property for the benefit of individuals; the seizure and disposition of the property, or the arrest or detention of the persons, of individuals; or otherwise bring them into conflict with the rights of individuals; are generally required to furnish official bonds, for the safety of those interested in or injured by the exercise of such powers and duties. The bond thus given affords merely a cumulative security for the due performance of the duties of the officer; for he is liable

to an appropriate action for any failure to perform the same, without reference to his bond, and of course without joining his sureties.¹ Thus a county may maintain assumpsit against its treasurer for moneys received by him, and not duly accounted for and applied; and so it may prove its demand against the estate of its deceased treasurer in the probate court.² Taking the official oath, and, where a bond is required, giving the official bond, constitute the most satisfactory evidence of the acceptance of a public office by the person chosen to fill it. And it has been said that where the oath of office is taken, but the bond required by statute is not given, the office is not accepted;³ a remark which may be correct in the abstract, but, as will hereafter be shown, is subject to several qualifications in its practical application. The officer who is required to administer the oath, or act upon the bond, has no power to inquire into the validity of the title to the office of the person tendering it. Thus, where an infant has been chosen to a public office, and the statute confines the right to hold the office to persons of full age, the officer authorized to administer the official oath cannot lawfully refuse to administer it to the person so chosen, by reason of his ineligibility.⁴ And where a statute authorizes the board of supervisors of a county to approve an official bond, the board, although in so doing it exercises judicial powers, has no authority to refuse to approve the bond, on the ground that the officer had tendered his resignation before the time when he was authorized to take possession of the office, or before he had qualified and entered upon the duties thereof; and an order rejecting the bond for that reason will be annulled.⁵

¹ *Post*, ch. 29.

² *Cole Co. v Dallmeyer*, 101 Mo. 57.

³ *Morrell v Sylvester*, 1 Maine 248.

⁴ *People v Dean*, 3 Wend. (N. Y.) 438.

⁵ *Miller v Supervisors*, 25 Cal. 93.

§ 171. **Officer succeeding to new office ; evidence, color of title.**—Where, by force of a constitution or statute, an officer succeeds to another office, upon a vacancy happening in the latter, the usual course is for the person so succeeding to take a new official oath, and to give a new official bond, if a bond is required by law; and, upon principle it seems that it is necessary for him to do so. But the justices of the supreme court of Maine have held, that where, by virtue of a provision in the constitution of the state, the president of the senate becomes the acting governor, an additional oath of office is not necessary.¹ In quo warranto, the fact that the defendant holds the certificate of election or appointment, and is acting in the office to which he lays claim, raises the presumption that he duly took the official oath, and gave the official bond, as required by the statute.² The cases, where it is or is not permitted to inquire, whether an acting officer has taken the official bond as required by law, will be fully examined in a subsequent chapter, relating to the exercise of power by an officer *de facto*.³

§ 172. **Effect of statute fixing time to qualify as to certain persons.**—A statute, requiring an official oath to be taken and an official bond to be given, within a certain time, applies only to persons declared to be elected, and to whom the certificate of election has been given. Therefore where an action is brought upon the relation of the defeated candidate, to test the right of the person to whom the certificate of election was given, it is not necessary that the relator should file or offer to file the official oath and bond. As to the bond, the officer empowered to approve it, has no right to try the validity of the election, and recognize the relator as the lawful officer, by taking and approving an official bond from him; so

¹ Opinion of the Just., 70 Me. 593.

See also *Barada v Carondelet*, 8 Mo. 644.

² *People v Clingan*, 5 Cal. 389.

³ *Post*, ch. 27.

that the tender of such a bond would be an idle ceremony; and as to the oath, "no person can reasonably be required to swear that he will perform the duties of an office, out of which he is thus kept by another, and which it is yet uncertain whether he can ever obtain."¹ And where a statute requires a person elected to an office to qualify within a certain time, and declares that the office shall be vacant if he fails so to do, if two persons receive the same number of votes at an election, neither is required to qualify, until the result of the election is determined, although such determination is not made until after the expiration of the statutory time.² Where the officer did not receive his commission, until seventeen days had elapsed since his term began, and he had no knowledge, until its receipt, that he had been appointed to the office; it was held that the ten days, within which he was required to qualify, commenced to run upon the receipt of the commission, although the statute required a person appointed to an office to qualify within fifteen days after the commencement of his term.³

§ 173. **Construction of statutes fixing time for officer to qualify.**—Where a statute fixes the time, within which the official oath must be taken, or the official bond given, the weight of the American authorities is decidedly in support of the doctrine, that the provision respecting the time is directory, although the statute declares that the office is forfeited by the default; and that, unless the statute expressly declares that the failure to take the oath or to give the bond, by the time prescribed, *ipso facto* vacates the office, the oath may be taken and the bond

¹ *People v Miller*, 16 Mich. 56.
See also *People v Potter*, 63 Cal. 127;
People v Mayworm, 5 Mich. 146;
Pearson v Wilson, 57 Miss. 848;
People v McManus, 34 Barb. (N. Y.) 620;
22 How. Pr. (N. Y.) 25;

State v Dahl, 65 Wis. 510, cited *post*,
§ 175.

Little v State, 75 Tex. 616.

² *State v Kraft*, 18 Oreg. 550.

³ *People v Perkins*, 85 Cal. 509.

given at any time afterwards, before judgment of ouster upon an information in the nature of a quo warranto, or other legal declaration that the office is thereby vacated.¹ But the authorities are not uniform in support of this doctrine; for it has been held, in other cases, that the failure to take the oath or to give the bond, within the prescribed time, vacates the office, without any proceedings to declare it vacant; so that it cannot be restored by a subsequent compliance with the statute.² And where the prescribed time expires, before the commencement of the term of the officer elect, the former incumbent holds over, as in case of a failure to choose his successor. And it has been held, that where the statute declares that an office shall become vacant, by the failure

¹ *Dillon Mun. Corp.*, 4th ed., § 214 (*153);
Paine on Elections, § 232;
 See also *Sprowl v Lawrence*, 33 Ala. 674;
State v Ely, 43 Ala. 568;
State v Falconer, 44 Ala. 696;
Ross v Williamson, 44 Ga. 501;
Cawley v People, 95 Ill. 249;
Chicago v Gage, 95 Ill. 593, rev'g *Gage v Chicago*, 2 Ill. App. 332;
State v Porter, 7 Ind. 204;
Smith v Cronkhite, 8 Ind. 134;
Boone County v Jones, 54 Iowa 699;
Morgan v Vance, 4 Bush (Ky.) 323;
Curry v Stewart, 8 Bush (Ky.) 560;
State v Peck, 30 La. Ann., I, 280;
State v Ring, 29 Minn. 78;
State v Churchill, 41 Mo. 41;
State v County Court, 44 Mo. 230;
Kearney v Andrews, 10 N. J. Eq. 70;
People v Holley, 12 Wend. (N. Y.) 481;
McRoberts v Winant, 15 Abb. Pr. N. S. (N. Y.) 210;
Duntley v Davis, 42 Hun (N. Y.) 229;
People v Ferguson, 20 Week. Dig. (N. Y.) 276;
Foot v Stiles, 57 N. Y. 399;
People v Crissey, 91 N. Y. 616;
Cronin v Stoddard, 97 N. Y. 271;

State v Findley, 10 Ohio 51;
State v Colvig, 15 Oreg. 57;
Comm. v Read, 2 Ashm. (Pa.) 261,
State v Toomer, 7 Rich. L. (S. C.) 216;
Bank v Dandridge, 12 Wheat. (U.S.) 64;

² *Falconer v Shores*, 37 Ark. 386;
People v Taylor, 57 Cala. 620;
People v Perkins, 85 Cala. 509;
In re Att'y Gen'l, 14 Fla. 277;
State v Hadley, 27 Ind. 496;
State v Johnson, 100 Ind. 489;
State v Matheny, 7 Kan. 327;
Creighton v Comm., 83 Ky. 142;
Childrey v Rady, 77 Va. 518;
Johnson v Mann, 77 Va. 265;
Vaughan v Johnson, 77 Va. 300;
Kilpatrick v Smith, 77 Va. 347;
Branham v Long, 78 Va. 352;
Owens v O'Brien, 78 Va. 116;
 See also *Jackson v Simonton*, 4 Cranch Cir. Ct. (U. S.) 255; *Bennett v State*, 58 Miss. 556; and, in England, *Prowse v Foot*, 2 Bro. P. C. 289; *Anon.*, Free., 474.

Many of the cases cited in this note, turned upon the peculiar language of the statute in question.

of the officer to renew his bond annually, his failure so to do does not vacate his office, without judgment of ouster or forfeiture;¹ and that a subsequent compliance with the statute will cure the defect, and prevent a judgment of forfeiture in proceedings for that purpose.² On the other hand, it has been held, that a statute, requiring an officer elect to qualify within a prescribed time, will be considered as directory, only where circumstances beyond his control have caused a delay; not in case of a neglect or refusal.³ So where the statute requires two or more bonds, and the officer enters after having given one, the subsequent tender and acceptance of the remainder cures the defect.⁴

§ 174. **Rulings where oath and bond were not given within statutory time; effect of failure as to former office.**—Where a person, elected a justice of the peace, filed an official bond within the time prescribed by law, which complied with the statute, except that the condition omitted a recital well and truly to perform all duties enjoined by law, to the best of his ability, and after the time had expired, he filed another bond, fully confirming to the statute; it was held, on quo warranto, that the first bond was insufficient; that the second was not filed in time; and that the office was consequently vacant.⁵ Where an act was passed, after a person had been elected lieutenant-governor, providing that the lieutenant-governor should be *ex officio* state librarian, and should give a bond in the latter capacity; and, after the bond was given, one of the sureties withdrew, pursuant to a statute allowing him so to do; and the principal failed to give another bond, whereupon the governor declared the

¹ Clark v Ennis, 45 N. J. L. 69.

⁴ People v Smith, 81 N. C. 305.

² Cawley v People, 95 Ill. 249.

⁵ People v Percells, 8 Ill. 59.

³ Flatan v State, 56 Tex. 93.

See also, Comm. v Yarbrough, 84 Ky. 496.

See also Ross v Williamson, 44 Ga. 501.

office of state librarian vacant; it was held that the office of state librarian was, but the office of lieutenant-governor was not, vacated by the failure.¹ Where county commissioners appointed a person county treasurer, provided that he should give a bond within two days thereafter, and he gave the bond three days thereafter and the same was not objected to, it was held that he was lawfully in office.² And a bond given several months after the party's election, and while he was holding the office, is valid, to the extent that the sureties therein are liable for subsequent defaults.³ Where a town collector is required by law to take an oath, but no time for taking it is fixed, and he is also required to give a bond within ten days after notice of the amount of taxes to be collected, he may take the oath at any time before the office is forfeited by his failure to give the bond; and it is not so forfeited until after the supervisor of the town, or the board of supervisors of the county, has given him actual notice of the amount of taxes: he is not bound to take notice of their proceedings fixing the tax.⁴ Where the statute requires an official bond to be taken at a particular term of a court, the court cannot take it at any other term; and if it is not taken at the prescribed term, the office is forfeited.⁵ But in another case, it was held that where the bond was filed with the clerk in vacation, and indorsed by him as so filed, and no action was taken by the court thereupon, the bond was valid against the obligors therein.⁶

§ 175. **The same subject.**—Where the officer elect failed to file his bond seasonably, in consequence of the refusal to approve it by the officer whose duty it was to do so, the bond may be filed after judgment in his favor,

¹ *State v Laughton*, 19 Neva. 202.

⁴ *People v McKinney*, 52 N. Y. 374.

² *State v Ring*, 29 Minn. 78.

⁵ *Calloway v Comm.*, 4 Bush (Ky.) 383.

³ *Weston v Sprague*, 54 Vt. 395.

⁶ *Jones v State*, 7 Mo. 81.

in an action to oust a usurper; and the rule is the same, with respect to any other act necessary to enable him to discharge the duties of the office.¹ But in proceedings to oust an officer for his failure to take the official oath, or give the official bond, within the time required by law, it is no defence that the omission resulted from a mistake.² A justice of the peace, sued for an arrest, cannot justify unless he had taken the oath of office before the arrest was made, although he took it on the same day.³ And an officer who has failed to take the official oath, as required by statute, before entering on the duties of his office, cannot have the salary attached to the office.⁴ But where he has taken the oath, but has filed it in the wrong office, the error does not affect his title to the office.⁵

§ 176. **Bond invalid, where not filed in season, and filed after reappointment.**—Where a person elected to an office, failed to file his official bond, which had been executed by him and his sureties, until after the expiration of the time prescribed by law, whereupon the office was declared vacant; and the same person was appointed to the office, and thereupon filed the bond first prepared; it was held that the sureties were not liable upon the bond.⁶

II. *Rulings relating to the sufficiency and effect of an official oath.*

§ 177. **Test oath; office not vacated because test oath is false.**—The form of the official oath is usually pre-

¹ State v Dahl, 65 Wis. 510.

See also *ante*, § 172.

So there is no forfeiture for failure to take the official oath within the time specified by law, where the officer whose duty it was to administer the oath refused so to do. State v Kraft, 18 Oreg. 550.

² State v Matheny, 7 Kan. 327.

³ Courser v Powers, 34 Vt. 517.

⁴ Thomas v Owens, 4 Md. 189;
Philadelphia v Given, 60 Pa. St. 136.

⁵ People v Perry, 79 Cal. 105.

⁶ Winneshiek Co. v Maynard, 44 Iowa 15.

scribed in the constitution, accompanied with a declaration that no other oath shall be required as a qualification for an office. The latter clause is intended to guard against the imposition of test oaths, except in cases where the constitution itself requires such oaths. It has been said that a state cannot, even by its constitution, prescribe a test oath, which will exclude a person from office by reason of an act, which was innocent when he committed it.¹ Where a provision of the constitution of a state requires every officer to take an official oath, unless the legislature otherwise provides, it is not necessary in order to exempt an inferior officer from taking an oath, that the legislature should expressly provide that he shall not be required so to do; it suffices that such an intent on the part of the legislature is manifest in the statute.² An office is not vacated because a special oath required by law, *ex gr.*, an oath against bribery, is false; but, by statute, a disability to hold the office would follow a conviction for perjury in taking it.³

§ 178. **Effect of statute prescribing who may take oath.**—It has been held that a statute, designating the officers to administer official oaths to particular officers elect, or a particular class of such officers, is merely directory, and that the oath may be administered by any officer authorized so to do by a general statute.⁴ But the oath of a United States officer, under the act of congress of July 2, 1862, prescribing a test oath to be administered, with respect to participation in the civil war, must be taken before an officer authorized to administer oaths by the laws of the United States; and a foreign consul, residing in Mexico, has no authority to administer

¹ *Cummings v Missouri*, 4 Wall. (U. S.) 277.

² *School Directors v People*, 79 Ill. 511.

³ *People v Thornton*, 25 Hun (N. Y.) 456, rev'g 60 How. Pr. (N. Y.) 457

⁴ *Ex parte Heath*, 3 Hill (N. Y.) 42; *Canniff v Mayor, etc.*, 4 E. D. Smith, (N. Y.) 430.
See also *State v Stanley*, 66 N. C. 59.

the same.¹ And it was held, in an English case, that where the charter required a newly elected mayor to be sworn into office before the old mayor, this in effect requires him to be sworn in by the old mayor; so that, where the clerk administered the oath, in the presence of the old mayor, but against the latter's consent, the new mayor had not qualified.² But the taking of an official oath, before an officer not authorized to administer it, does not render void the official acts of the person taking it, and assuming the office thereupon; for the rule sustaining the acts of an officer *de facto* will validate his acts.³

§ 179. **Rulings respecting sufficiency of oath; evidence that it has been taken.**—A memorandum in writing, at the foot of the certificate of appointment of a person to fill a city office, in the following words: "Sworn before me this 31st day of December, 1857, F. W., Mayor," is not a sufficient oath of office.⁴ If, however, the governor certifies that an officer has duly taken the oath according to law, such certificate suffices, although the oath is not set out, for it will be intended that the proper oath was administered.⁵ So where a record states that a public officer "took the oath of office," it will be intended that the oath prescribed by law was taken.⁶ And where the certificate does not show the fact, it may be proved by extrinsic evidence that an oath of office was taken before the proper officer.⁷

§ 180. **Rulings as to formal defects in oaths; effect as to title to office.**—An official oath is not vitiated by the omission of any "venue,"⁸ if in fact it was taken within

¹ *Otterbourg v United States*, 5 Ct. of Cl. (U. S.) 430.

² *Rex v Ellis*, 9 East. 252, note; 2 Str. 994.

³ *State v Perkins*, 24 N. J. L. 409.
See also *post*, § 630.

⁴ *Halbeck v Mayor, etc.*, 10 Abb. Pr. (N. Y.) 439.

⁵ *Harwood v Marshall*, 9 Md. 83.

⁶ *Scammon v Scammon*, 28 N. H. 419.

⁷ *State v Green*, 15 N. J. L. 88.

⁸ *Horton v Parsons*, 37 Hun (N. Y.) 42, aff'g 1 How. Pr. N. S. (N. Y.) 124.

See also, *Colman v Shattuck*, 62 N. Y. 348.

the jurisdiction of the officer;¹ nor by the fact that the name of the person taking it is misspelled in the body of the affidavit, the signature being correct;² nor by a slight error in the designation of the office;³ nor by the use of the words "declare and affirm" where the statute requires the oath to be in the words "I promise and affirm."⁴ But an oath, "faithfully to discharge their duties," is not a compliance with a statute, requiring road viewers to take an oath to discharge their duties "impartially, and according to the best of their judgment."⁵ The rule to be deduced from the cases is, that where the constitution or the statute prescribes the form of the official oath to be taken, that form must be substantially followed, and any material variation from it will render the oath invalid; but a strict literal adherence to the form prescribed is not required, provided the variation does not alter the effect.⁶

§ 181. **The same subject.**—A recent case in New York has extended to its utmost limits the doctrine, that a defective oath of office will not vitiate the officer's title to his office. In an action, brought by a town overseer of the poor, to recover penalties for unlawful sales of intoxicating liquors, it appeared that the action was originally brought by one N, the plaintiff's predecessor, who died in office, and the plaintiff was substituted in his place; and that N had taken and filed an official oath in accordance with a former statute, but not in accordance with a subsequent constitutional amendment; whereupon the defendant contended that N was not in office *de jure* when the action was commenced. The general statute provided that an overseer of the poor, within a specified

¹ *People v Stowell*, 9 Abb. N. C. (N. Y.) 456.

⁴ *Bassett v Denn*, 17 N. J. L. 432.

² *Hoagland v Culvert*, 20 N. J. L. 387.

⁵ *In re Cambria Street*, 75 Pa. St. 357.

³ *People v Perkins*, 85 Cal. 509

⁶ *State v Trenton*, 35 N. J. L. 485.

time and before entering upon his office, should take the oath of office, and if he neglected to do so, such neglect should be deemed a refusal to serve; and that, in case of a refusal to serve, a special town meeting should be called to supply the vacancy. No such meeting was held. Bradley, J., delivering the opinion of the court, after saying that the action could not be maintained, unless N was an officer *de jure* as well as *de facto*, continued: "He became an officer by the election, and his title to it was defeasible. His right to continue to hold it depended upon the statutory conditions, one of which was the taking of the oath of office. He was in no sense a usurper of the office, but was legally inducted into it by election. It may not appear clear that" (he was) "an officer *de jure*, in the strict sense of that term, since by the terms of the statute his right to perform the duties of the office, seems dependent on his taking the oath. But it has been held in effect that the statute is not self executing, and does not work a forfeiture for the cause it affords, but that it must come from some act, judicial or otherwise, which effectually ousts him, and severs his relation to the office; and that until then he is practically an officer *de jure*, having a defeasible title to the office. Upon that theory, when no judicial action is taken to that respect, the vacancy is conditional, depending upon election to fill it, and thus effecting his ouster from the office. And this may be the statutory rule to apply, in view of the needs which may arise in the public service, requiring the performance of the duties of an officer, which is in the interest of the public, not of the individual. And public policy is entitled to and has consideration, in the construction of statutes and their effect, so far as their provisions may permit. The statute does not in terms declare that the office shall be vacant on the failure to take the oath of office; but merely provides for an election, arising out of what

is treated by it as a refusal to serve, to supply a vacancy, the cause for which is furnished and provided for by the statute in the events there mentioned." And so a judgment for the plaintiff was affirmed.¹

III. *Rulings relating to the sufficiency and effect of an official bond.*

§ 182. **Effect of defects in bond, justification, acknowledgement, or approval, as to liability.**—The statute, relating to an official bond almost invariably requires that it shall be executed by the principal and one or more sureties; that it shall be acknowledged before an officer or a court; that the sureties shall justify in a particular manner, and to a particular amount; and that the bond shall be approved by an officer or a court, and filed in a particular office. It is well settled that the validity of the bond, that is, the liability of the principal and sureties therein, is not affected by an omission to acknowledge it; or by an acknowledgement before an officer not empowered to take the acknowledgement, or by a failure to approve it; or an approval by an unauthorized officer or court;² or by any defects in the justification.³

§ 183. **Rulings as to sufficiency, date, and effect of approval.**—With respect to the approval of an official

¹ *Horton v Parsons*, 37 Hun (N. Y.) 42, aff'g 1 How. Pr. N. S. (N. Y.) 124; citing *Foot v Stiles*, 57 N. Y. 399; *People v Crissey*, 91 N. Y. 616, on pp. 635, 636; *Cronin v Gundy*, 16 Hun 520; *Clark v Ennis*, 45 N. J. L. 69; *Plymouth v Painter*, 17 Conn. 585; *St. Louis Co. Court v Sparks*, 10 Mo. 117. As to the effect of substituting an officer *de jure* in place of an officer *de facto* in a pending action, see also *People v Brown*, 47 Hun (N. Y.) 459.

² *People v Edwards*, 9 Cala. 286;

Davis v Haydon, 4 Ill. 35; *Green v Wardwell*, 17 Ill. 278; *State v Blair*, 32 Ind. 313; *McCracken v Todd*, 1 Kan. 148; *Young v State*, 7 Gill & Johns. (Md.) 253; *Wendell v Fleming*, 8 Gray (Mass.) 613; *People v Johr*, 22 Mich. 461; *Carmichael v Governor*, 4 Miss. 236; *Moore v State*, 9 Mo. 330; *McLean v Buchanan*, 8 Jones L. (N. C.) 444; *Musselman v Comm.*, 7 Pa. St. 240.

³ *People v Smyth*, 28 Cala. 21.

bond, it has been held that an officer who is sued, cannot justify as an officer, unless his official bond has been approved as required by law.¹ But as respects the sureties' liability, the approval is not deemed in law a part of the bond; and, in an action upon the bond, the sureties are not entitled to oyer of the approval.² In general, the approval takes effect from the time when it is made, and does not relate back to the date or the actual delivery of the bond.³ And where a surety died, after delivery but before approval of the bond, it was held that he was liable thereupon.⁴ But where a statute requires an official bond to be given and approved by a certain day; and on that day the officer elect delivers the bond to the officers empowered by law to approve it, and they retain it till the next day, their approval on the latter day relates back to the presentment, and satisfies the statute.⁵ So where a collector's bond is seasonably filed, the acceptance thereof, after the statutory time, relates back to the filing, and renders it sufficient.⁶ Where the tribunal, authorized to approve a new bond, given by the officer during his term, pursuant to the requirements of a statute, refuses to act upon it, the officer is not bound to sue out a mandamus, but he may set up the refusal in defence of his right to the office.⁷

§ 184. **Sufficient evidence as to approval.**—The approval of an official bond may be inferred from circumstances, unless the statute expressly prescribes that it must be proved in a specified mode. Thus, where a postmaster

¹ *Rounds v Mansfield*, 38 Me. 586;
Rounds v Bangor, 46 Me. 541.
 See also *ante*, § 175, and *post*, §§ 649, *et seq.*

² *Clark v State*, 7 Blackf. (Ind.) 570.

³ *Bruce v State*, 11 Gill & Johns. (Md.) 382;
State v Jarrett, 17 Md. 309;
United States v Le Baron, 19 How. (U. S.) 73;

Postmaster General v Norvell, Gilp. (U. S.) 106.

⁴ *Mowbray v State*, 88 Ind. 324.
 See also *Broome v United States*, 15 How. (U. S.) 143.

⁵ *State v Tool*, 4 Ohio St. 553.

⁶ *Drew v Morrill*, 62 N. H. 23.

⁷ *People v Scannell*, 7 Cal. 432.

delivers his official bond to the postmaster-general for approval, and the latter retains it for a long time without objection, his approval thereof will be presumed.¹ And generally, an approval may be presumed from the inaction of the officer required by law to act, or other circumstantial evidence.² And where a statute requires the approval of an official bond to be made by a designated court, and provides that, if it is found to be insufficient, a record of that fact shall be made; and the bond is on file, and there is no record on the subject; it is deemed to have been approved, and is in force from the time when it was handed in to the court, although it never reached the treasurer, with whom the statute required it to be deposited.³

§ 185. **Defects in approval; rulings thereupon and upon acknowledgement.**—In general, the courts have been very liberal in disregarding defects in the approval of official bonds, where the statute does not expressly require a strict conformity to its requirements, in order to validate the bond, or enable the party to hold the office.⁴ Thus, where a statute prescribed that a particular officer, before entering upon the duties of his office, should file a certain official bond, approved by the supervisor; and in March, 1876, one B was elected to the office for a term of three years, and immediately filed his bond and entered upon

¹ *Postmaster General v Norvell*, Gilp. (U. S.) 106.

² *Pepper v State*, 22 Ind. 399;
Pierce v Richardson, 37 N. H. 306;
Young v Comm., 6 Binn. (Pa.) 88.
See also *Bartlett v Board of Education*,
59 Ill. 364.

³ *Apthorp v North*, 14 Mass. 167.
See also *Wright v Leath*, 24 Tex. 24;
Poer v Brown, 24 Tex. 34.
See, however, *ante*, § 174.

⁴ *People v Evans*, 29 Cala. 429;
Mendocino Co. v Morris, 32 Cala. 145;

Boone Co. v Jones, 54 Iowa 699;
Young v State, 7 Gill. & J. (Md.) 253;
Westerhaven v Clive, 5 Ohio 136.

For instances, where a defective approval was held to vitiate the bond, see *Crawford v Meredith*, 6 Ga. 552;
O'Marrow v Port Huron, 47 Mich. 585, distinguishing the case from *People v Johr*, 22 Mich. 461.

In the case in 6 Ga., the court held that the defective approval vitiated it as a statutory bond, and that the question whether it was good as a common law bond did not arise.

the duties of his office, but the bond was not approved by the supervisor until the town meeting in 1877; and at a town meeting held in 1876, upon the supposition that the office was vacant, votes were cast for K to fill a vacancy in the office, and he was declared to be elected, and qualified and assumed to act; the court held that K was not legally in office, even *de facto*; that the failure to procure the approval of B's bond "at the utmost afforded cause for forfeiture of the office, but did not create a vacancy; that could only be effected by a direct proceeding for the purpose."¹ The court referred to a previous case decided by it,² wherein it was held that by acceptance of an election to another office, a person vacated the office held by him, without any proceeding for the purpose; and said that the decision in that case turned upon the language of the statute, which declared that in such an event, the former office "shall immediately become vacant." So the acknowledgement of an official bond, before an officer not authorized to take the acknowledgement, does not vitiate a bond which has been duly approved, so as to entitle the predecessor of the officer elect to hold over.³

§ 186. **When official bond takes effect.**—An official bond takes effect from the delivery thereof;⁴ but where no other mode of delivery is expressly or impliedly required by the statute, the filing of the bond is in law a delivery thereof.⁵ But where the language of the bond is such as to cover the entire term of the officer, and it is delivered after the term has commenced, the sureties' liability extends back to the commencement of the term.⁶ In an action by a sheriff upon a bond of his deputy, conditioned for the faithful discharge of the deputy's duty,

¹ Cronin v Stoddard, 97 N. Y. 271, following Foot v Stiles, 57 N. Y. 399.

⁴ *Ante*, § 183.

² People v Brooklyn, 77 N. Y. 503.

⁵ Sacramento Co. v Bird, 31 Cal. 66.

³ State v Minton, 49 Iowa 591.

⁶ See *post*, §§ 205-207.

etc., it appeared that a bond had been previously given; but one of the sureties refused to be longer liable, whereupon the bond in suit was given. It was executed by the deputy and one of the sureties, on the 30th of January, 1878, and by the other surety on the 5th of February, 1878, and on that day was delivered to the sheriff, bearing date December 1, 1877. In December, 1877, the deputy made a levy, under an execution, upon property, which he sold in January, 1878. The property was claimed by a third person, who sued the sheriff and recovered, whereupon the sheriff brought this suit. A judgment for the plaintiff was reversed, the court saying: "The well established rule is that such a bond speaks only from its delivery. The delivery is presumptively at its date; but when the time of actual delivery is shown, the date becomes unimportant. . . . The liability for the acts of Dodge under the levy occurred by the sale, several weeks before the delivery of the bond in suit. . . . The case is not to be confounded with those, in which a bond or undertaking has been given to indemnify the sheriff, for proceeding with a levy previously made; in which case, the surrounding circumstances show the intention to indemnify against a liability previously incurred." ¹

§ 187. **Numerous cases establishing general rule as to defects in official bonds.**—The courts strongly incline to disregard irregularities and defects in, or relating to, or affecting, an official bond, such as deviations from the language of the statute prescribing its contents; or the proceedings of the person giving it; or of the officer, body, or court taking it, or charged with the duty of rendering it effectual; or the proceedings whereby the person giving it was chosen; or defects or insufficiencies in the evidence of his title; where

¹ Reilly v Dodge, 42 Hun (N. Y.) 646.

such irregularities or defects are not so substantial and material, that the essential provisions of the statute are not complied with: and this is so, whether the question arises in an action upon the bond, or in proceedings to oust the officer. Numerous cases, where such irregularities and defects have been disregarded, are cited in the note: they present a very great diversity, as respects the character of the defect or irregularity in question.¹ We shall presently illustrate the application of this rule, by citing in detail, some of the rulings upon particular defects in official bonds.

- ¹ *Boring v Williams*, 17 Ala. 510;
In re Read, 34 Ark. 239;
Hull v Shasta Super. Court, 63 Cal. 174;
Hubert v Mendheim, 64 Cal. 213;
Stephens v Crawford, 1 Ga. 574;
Smith v Taylor, 56 Ga. 292;
Mayo v Renfro, 66 Ga. 408;
People v Slocum, 1 Idaho 62;
People v Shannon, 10 Ill. App. 364;
Green v Wardwell, 17 Ill. 278;
State v Lynch, 6 Blackf. (Ind.) 395;
Ellis v State, 2 Ind. 262;
Yeakle v Winters, 60 Ind. 554;
Mowbray v State, 88 Ind. 324;
Carroll Co. v Ruggles, 69 Iowa 269;
Johnston v Gwathney, 2 Bibb. (Ky.) 186;
Justices v Bartlett, 5 B. Mon. (Ky.) 195;
Bonta v County Court, 7 Bush (Ky.) 576;
Whitehurst v Hickey, 3 Mart. N. S. (La.) 589;
Harris v Hanson, 11 Me. 241;
Quimby v Adams, 11 Me. 332;
Lord v Lancey, 21 Me. 468;
Trescott v Moan, 50 Me. 347;
Scarborough v Parker, 53 Me. 252;
Young v State, 7 Gill & J. (Md.) 253;
Frownfelter v State, 66 Md. 80;
Supervisors v Coffenbury, 1 Mich. 355;
Berrien Co. Treas'r v Bunbury, 45 Mich. 79;
Matthews v Lee, 25 Miss. 417;
Boykin v State, 50 Miss. 375;
Cox v Ross, 56 Miss. 481;
State v Kirby, 9 Mo. 295,
State v Cook, 72 Mo. 496;
State v O'Gorman, 75 Mo. 370;
Wimpey v Evans, 84 Mo. 144;
Co. Commissioners v Lineberger, 3 Monta. 231;
Williams v Golden, 10 Nebr. 432;
Kopplekom v Huffman, 12 Nebr. 95;
State v Rhoades, 6 Neva. 352;
Horn v Whittier, 6 N. H. 88;
Pierce v Richardson, 37 N. H. 306;
Hoboken v Evans, 31 N. J. L. 342;
McEachron v New Providence, 35 N. J. L. 528;
Titus v Fairchild, 49 N. Y. Super. Ct. 211;
Governor v Montfort, 1 Ired. L. (N. C.) 155;
Governor v Miller, 3 Dev. & Bat. L. (N. C.) 55;
Governor v Matlock, 2 Hawks (N. C.) 366;
Reid v Humphreys, 7 Jones L. (N. C.) 258;
Co. Com'rs v Magnin, 86 N. C. 285;
Place v Taylor, 22 Ohio St. 317;
McCaraher v Comm. 5 Watts & S. (Pa.) 21;
Philadelphia v Shallcross, 14 Phila. (Pa.) 135;
Musselman v Comm., 7 Pa. St. 240;
Stevens v Treasurers, 2 McCord (S. C.) 107;
Treasurers v Bates, 2 Bailey (S. C.) 362;
State v Toomer, 7 Rich. (S. C.) 216;
Miller v Moore, 2 Humph. (Tenn.) 421.

§ 188. **Defective statutory bonds sometimes sustained as common law obligations; rulings.**—Where the bond departs so materially from the provisions of the statute, that it cannot be sustained as a statutory bond, but the officer elect has obtained the office, and exercised its functions, the bond is often, especially where the question arises upon the liability of the sureties, sustained as a common law bond, unless such a result would violate some rule of public policy, or some statutory provision expressly declaring it to be void.¹ Thus it has been said, that it is sufficient to validate the bond at common law, that the bond was voluntarily given, and that it covers the office, and the duties assigned thereto.² So an additional voluntary bond, executed after entry into the office, is valid at common law.³ And where the sheriff

Goodrum v Carroll, 2 Humph. (Tenn.) 490;

Polk v Plummer, 2 Humph. (Tenn.) 500;
Governor v Porter, 5 Humph. (Tenn.) 165;

Boughton v State, 7 Humph. (Tenn.) 193;

Smith v Wingate, 61 Tex. 54;

Winslow v Comm. 2 Hen. & Mum. (Va.) 459;

United States v Bradley, 10 Pet. (U. S.) 343;

Rogers v United States, 32 Fed. R. (U. S.) 890;

Probate Court v Strong, 27 Vt. 202.

¹ *Montville v Haughton*, 7 Conn. 543;
Stephens v Crawford, 1 Ga. 574; s. c. 3 Ga. 499;

Stevens v Hay, 6 Cush. (Mass.) 229;

Sweetser v Hay, 2 Gray (Mass.) 49;

State v Bartlett, 30 Miss. 624;

State v Horn, 94 Mo. 162;

Lee v Waring, 3 Desau. (S. C.) 57;

Goodrum v Carroll, 2 Humph. (Tenn.) 490;

Polk v Plummer, 2 Humph. (Tenn.) 500;

King v Ireland, 68 Tex. 682;

Jessup v United States, 106 U. S. 147.

See also *Pritchett v People*, 6 Ill. 525:

Todd v Cowell, 14 Ill. 72;

Gradle v Hoffman, 105 Ill. 147;

Earnes v Brookman, 107 Ill. 317;

Sheppard v Collins, 12 Iowa 570;

Garretson v Reeder, 23 Iowa 21;

Supervisors v Coffenbury, 1 Mich. 354;

United States v Tingey, 5 Pet. (U. S.) 115;

United States v Bradley, 10 Pet. (U. S.) 343;

United States v Linn, 15 Pet. (U. S.) 290;

United States v Hodson, 10 Wall. (U. S.) 395.

² *United States v Rogers*, 28 Fed. R. (U. S.) 607.

³ *Johnson v Caffey*, 59 Ala. 331;

Todd v Cowell, 14 Ill. 72;

See also *State v Perkins*, 10 Ired L. (N. C.) 333;

Comm. v Wolbert, 6 Binn. (Pa.) 292.

is *ex officio* tax collector, and the statute does not require him to give a separate bond as tax collector, but he voluntarily gives one, it is valid at common law for the taxes.¹ But the authorities are not entirely in harmony on this question; for it has also been held that where the statute does not require an officer to give an official bond, if he voluntarily gives one, it is void.² And where a collector of the United States internal revenue, under the act of 1796, was required to give an additional bond as prescribed in the statute, and gave a bond, conditioned that he had accounted and would account for all taxes, collected or to be collected; it was held that the bond was void as to the sureties, with respect to the taxes previously collected, for the law did not require the bond to be conditioned for previous defaults.³

§ 189. **Bond sustained as common law bond must be enforced by common law rules; instances.**—Where the bond is upheld as a common law bond, it can only be enforced, at least in those states where the common law procedure has not been changed, according to the common law rules. Thus the successor in office of the obligee, or any other stranger to the bond, cannot maintain an action upon it.⁴

¹ *State v Harney*, 57 Miss. 863.

² *State v Heisey*, 56 Iowa 404;
See also *State v Bartlett*, 30 Miss 624;
United States v Humason, 6 Sawyer
(U. S.) 199;
United States v Tingey, 5 Pet. (U. S.)
115.

³ *Armstrong v United States*, Pet. Cir.
Ct. (U. S.) 46;
See also *United States v Brown*, Gilp.
(U. S.) 155;
Farrar v United States, 5 Pet. (U. S.)
373;
United States v Snyder, 4 Wash. (U.
S.) 559.

⁴ *Wilson v Cantrell*, 19 Ala. 642;
Tucker v Hart, 23 Miss. 548;
State v Bartlett, 30 Miss. 624;
Governor v Twitty, 1 Dev. L. (N. C.)
153;
Jones v Wiley, 4 Humph. (Tenn.) 146;
See also *Castele v Cornwall*, 5 Cala.
419;
Stevens v Hay, 6 Cush. (Mass.) 229;
Branch v Elliot, 3 Dev. L. (N. C.) 86;
Williams v Ehringhaus, 3 Dev. L. (N.
C.) 237;
Van Hook v Barnett, 4 Dev. L. (N. C.)
268;
Miller v Commissioners, 1 Ohio 271.

§ 190. **Rulings where bond departed from statute as respects the obligee.**—We will illustrate these principles, by examining some of the rulings of the courts, upon particular defects in official bonds. And first, as to a departure from the statute in the name or description of the obligee. Where the statute required an official bond to be given to the people of the State of California, it was held that a bond to “The State of California” was a sufficient compliance with the statute.¹ So a bond to the people of the state is sufficient, where the statute requires that it shall be given to the county;² or where the statute requires that it shall be given to the county, and it is given to the people of the county;³ or *vice versa*;⁴ or where it is given to the selectmen of the town, instead of the town: but in such a case it is good only as a common law bond, and cannot be enforced by their successors.⁵ So a bond given to the state has been upheld as a common law bond, where the statute required that it should be given to the township trustee;⁶ and a bond to the treasurer of the United States, where the statute required it to be given to the United States.⁷ An ordinary bond, in which the name of the obligee is omitted, is void;⁸ but in a case, decided in Arkansas, it was held that a county treasurer’s official bond, which did not name an obligee, was valid; and, that under the statute of Arkansas, the state could maintain an action upon it for the use of the county.⁹ Where a statute required the supervisor of a town to give an official bond

¹ *People v Love*, 19 Cal. 676;
See also *State v Henderson*, 40 Iowa
242.

² *Huffman v Koppelkom*, 8 Nebr. 344; s.
c., p. r., 12 Nebr. 95.

³ *Charles v Haskins*, 11 Iowa 329;
See also *Tevis v Randall*, 6 Cal. 603;
People v Love, 19 Cal. 676.

⁴ *Bay County v Brock*, 44 Mich. 45.

⁵ *Stevens v Hay*, 6 Cush. (Mass.) 229;
Sweetser v Hay, 2 Gray (Mass.) 49.

⁶ *State v Horn*, 94 Mo. 162;
See also *King v Ireland*, 68 Tex. 682.

⁷ *Jessup v United States*, 106 U. S. 147.

⁸ *Phelps v Call*, 7 Ired. L. (N. C.) 262.

⁹ *State v Wood*, 51 Ark. 205.

to the town clerk, and the bond was given to "A. J. H., town clerk of," etc., it was held that the bond was not to the individual, but to the officer; that it satisfied the statute; and that the town clerk's successor could maintain an action upon it.¹ And a bond required to be given to the treasurer of a township is valid, where it runs to the trustees of the township.² So where the statute required a village officer to execute an official bond "to the village by its corporate name," it was held that a bond to the trustees of the village, and their successors in office, was a substantial compliance with the statute.³

§ 191. **The same subject.**—But it has been held, that where the statute requires that a bond be given to the state, a bond to the governor and his successors is not a valid statutory bond, and that an action upon it in the name of the governor's successor, will not lie.⁴ And a clerk's bond, running to the justices of the county by name, he being one of them, and they not being a corporate body, cannot be sued in the names of their successors; although if it had been given to the justices collectively, by their official title only, it would have been valid.⁵ But in another case, it was held that an officer's bond is not void, because the penalty is payable to himself in another capacity.⁶

§ 192. **Rulings where bond departed from statute as respects the condition thereof.**—With respect to variances in the condition of the bond from the requirements of the statute, if the statute enumerates particular duties, for

¹ *Sutherland v Carr*, 85 N. Y. 105;
See also *Smith v Wingate*, 61 Tex. 54.

² *Barret v Reed*, 2 Ohio 400.

³ *Warren v Philips*, 30 Barb. (N. Y.) 646.
See also on this subject, *post*, § 284.

⁴ *Tucker v Hart*, 23 Miss. 548.

⁵ *Justices v Armstrong*, 3 Dev. (N. C.)
284.

⁶ *Marshal v Hamilton*, 41 Miss. 220.

the performance of which the condition must provide, and also contains general words, including the officer's whole duty, an obligor in a bond is not discharged from the general obligation, by the omission of the particular enumeration.¹ So if the condition of the bond is more specific than the statute requires, yet if it substantially conforms to the statutory requirements, and imposes no additional obligations, it is good as a statutory bond.² So if several conditions are required, they are regarded as cumulative, and the omission of one or more does not invalidate the others.³ But quere, whether, where the statute requires a bond from a disbursing officer, conditioned for the faithful discharge of his duties, and also for the faithful disbursement of money, and the latter condition is omitted, it is not covered by the former, as it would be if the statute had not been so specific.⁴ If the bond contains conditions which the statute does not require, it is good to the extent of the statutory requirements, and void for the excess.⁵ But a surety is not holden upon a bond, which does not substantially conform to the statute.⁶

§ 193. **The same subject.**—In an action brought by the plaintiff in an execution against a constable and his sureties, on the constable's official bond, one of the defences was that the condition of the bond was not in the form prescribed by the statute. The condition of the bond was to the effect, that the constable should faithfully discharge his duties, and account for, and pay over all moneys received by him as constable; whereas the statute required that it should be for the payment to the persons entitled

¹ *Justices v Wynn*, Dudley (Ga.) 22.

² *Boring v Williams*, 17 Ala. 510;
See also *Supervisors v Van Campen*, 3
Wend. (N. Y.) 48.

³ *Farrar v United States*, 5 Pet. (U. S.)
373.

⁴ *Farrar v United States*, 5 Pet. (U. S.)
373.

⁵ *State v Findley*, 10 Ohio 51.
See also *Armstrong v United States*,
Peters C. C. 46.

⁶ *Jackson v Simonton*, 4 Cranch, C. C.
(U. S.) 255.

thereto of all the moneys collected upon executions, and of all damages incurred by any act of the constable. The court affirmed a judgment for the plaintiff, saying: "Courts have made a broad distinction between bonds given by public officers, and bonds taken by such officers in the supposed discharge of their duty. As to the former, courts are liberal; as to the latter, strict, in order to prevent oppression. It was the constable's duty to cause a proper bond with sureties to be executed, approved, and filed. He and his sureties were the persons to see that it was in the right form. It would be highly unreasonable should they now escape liability, and thus to be permitted to practice a fraud on all who might be injured by the constable's neglect. The act of the sureties in executing the bond has enabled the constable to act as such."¹ But where a sheriff's official bond, which was required by law to cover his entire official term, was conditional only for the years 1872 and 1873, and an action was brought thereupon for his default in collecting the taxes for 1874; it was held that the sureties were not liable, notwithstanding a curative statute, saving official bonds which varied from the provisions prescribed by law. The court said: "The object" (of the statute) "was to enforce the substance of the obligation, without regard to formal defects or variances. But it certainly never was the purpose of the act, to make men do that which they never undertook to do, in form or in substance, nor especially to do precisely the contrary of their undertaking."²

§ 194. **Rulings where instrument given for bond was not sealed.**—A bond, *ex vi termini*, imports a sealed instrument; but where the sureties neglected to affix their seals to an instrument, given as an official bond, a court of equity will decree that it stand as if it has been sealed.³

¹ Jones v Newman, 36 Hun (N. Y.) 634.

² Prince v McNeill, 77 N. C. 398.

³ Rutland v Paige, 24 Vt. 181.

See also Raymond v Lent, 14 Johns. (N. Y.) 401;

Whitney v Coleman, 9 Daly (N. Y.) 238.

And it has been held that an unsealed instrument, if delivered and accepted as an official bond, is valid against the parties, who are liable thereupon in *assumpsit*.¹

§ 195. **Rulings where principal not a party, and where names do not appear in body.**—Where the statute requires that the principal shall be one of the obligors in the bond, a bond executed by the sureties only is invalid, as a statutory or a common law bond, although it has been approved by the proper authority.² But where there is no statutory provision, the sureties are liable, if the bond is filed without its execution by the principal, although they executed it in reliance upon his promise also to execute it.³ And, unless the statute expressly so requires, an official bond is valid, although the names of the sureties do not appear in the body of it.⁴ Where a bond was signed by four persons as obligors, but a blank in the condition, left for the principal's name, was not filled up, so that it did not appear on the face of the bond who was the principal, and who were the sureties, it was held that the bond was void.⁵ But another case held that the omission of the principal's name in the body of the bond, where the intent is clear from the context, does not vitiate.⁶

§ 196. **Bond executed with blanks, afterwards filled without parties' assent.**—Where the parties executed a bond with blanks left in it, and delivered it to the proper officer for approval; it was held that he might fill up the blanks, and that the bond as thus filled up was valid.⁷

¹ *Boothbay v Giles*, 68 Me. 160.

² *Mayo v Renfro*, 66 Ga. 408.

See also *People v Hartley*, 21 Cal. 585, and *post*, §§ 266, *et seq.*

³ *School Trustees v Scheik*, 119 Ill. 579, rev'g 16 Ill. App. 49.

See also *Bartlett v Board of Education*, 59 Ill. 364.

⁴ *Hodgkin v Holland*, 34 Ark. 203;

See also *Stewart v Carter*, 4 Nebr. 564; *Partridge v Jones*, 38 Ohio St. 375.

⁵ *Grier v Hill*, 6 Jones L. (N. C.) 572.

⁶ *Rader v Davis*, 5 Lea (Tenn.) 536.

See also *Moore v McKinley*, 60 Iowa 367.

⁷ *Hultz v Comm.*, 3 Grant Cas. (Pa.) 61. See also, *State v Pepper*, 31 Ind. 76.

But in another case, where the bond was executed by the sureties on a printed form, with blanks left unfilled, including the names of the obligors, and the penalty, and the blanks were filled without the sureties' knowledge, and the bond thus filled up was delivered to and accepted by the proper officers; it was held, upon a plea of *non est factum*, that the bond was not obligatory upon the sureties.¹ Where a printed form of a city treasurer's bond was executed, with blanks left unfilled for the names of the obligors, the amount of the penalty, the date of the instrument, and the title of the office; and the blanks were afterwards filled up, by direction of the principal, but without the express assent of the sureties, by one of the city officers, and the bond filed with the city clerk, its legal custodian, who had notice of the facts; it was held that the bond was valid, and that the sureties were liable in an action upon it.²

§ 197. **Alteration in bond, or in parties, without other parties' assent.**—A material alteration in an official bond, after its execution by a surety, but without his assent, will vitiate it as to him, as in the case where a private bond is thus altered. Thus it was held, that an action would not lie upon a tax collector's bond, which had been so altered, to correspond to a reassessment of the taxes.³ And where the principal, after execution and before delivery of his official bond, erased the name and signature of one of the sureties; it was held that the sureties were not bound.⁴ Where the officer who approved the bond was one of the sureties, it was held that his

¹ United States v Nelson, 2 Brock, (U. S.) 64.

² Chicago v Gage, 95 Ill. 593, rev'g s. c., p. r., 2 Ill. App. 332. Upon the question whether sureties are liable, where the bond, as executed by them, contains the names of other

persons who were to become their co-sureties, but it was delivered without execution by the latter, see *post*, §§ 259, *et seq.*

³ Doane v Eldridge, 16 Gray (Mass.) 254.

⁴ State v Craig, 58 Iowa 238.

approval did not ratify such an erasure of the name and signature of another surety, unless it was made with knowledge on his part, that the sureties, whose signatures were not erased, had not assented to the erasure.¹ Some important rulings have recently been made in Missouri, on the subject of the alteration of an official bond. It has been said that where an officer, having by law the custody of an official bond, alters or defaces it after it has been filed, this is an act of spoliation by a stranger, and does not effect the liability of any of the parties; but where he does so before delivery or acceptance, this is not spoliation by a stranger;² that the county court, in accepting an official bond acts ministerially, and if it had knowledge that a surety's name had been erased, without the knowledge and consent of the other sureties, the latter are discharged; that the bond is void as to a surety, who executed after the erasure and without knowledge thereof;³ that where a collector's bond was presented to the county court for approval, and one of the sureties objected to the approval as unlawful, because he was a judge of the court, whereupon his name was erased, either by the clerk or by the collector, in presence of the judges, and a new surety executed the bond in the same place, and opposite the same seal, whereupon it was approved; this releases the sureties who had previously executed the bond, and who did not consent to the change, and also a surety who signed it after the erasure, and without knowledge thereof.⁴ In a case decided in Mississippi, where the sureties, after executing the bond, delivered it to the principal, a tax collector, for approval and filing, and the bond having accidentally become

¹ State v Churchill, 48 Ark. 426.

² State v McGonigle, 101 Mo. 353.

³ State v McGonigle, 101 Mo. 353, distinguishing State v Potter, 63 Mo. 212.

⁴ State v Findley, 101 Mo. 368. As to the principle upon which these cases were decided, see the suggestions of the author, *post* §§ 264, 277, and cases cited in division XII of chapter 12.

mutilated, the collector cut off the signatures, and attached them to a copy of the bond; it was held that the bond was valid as to all the parties.¹

§ 198. **Rulings where bond varies from statute as to penalty.**—A variation from the statutory directions as to the penalty, by making the penalty larger than the sum prescribed, does not vitiate the bond, as to any of the parties, but it is binding only to the amount of the statutory penalty.² Where the statute required the amount of the penalty to be fixed by the board of education, and the board accepted a bond with the penalty inserted therein by the obligors, without being previously fixed by the board, it was held that the statute was satisfied.³

§ 199. **Rulings upon various other departures from statutory requirements.**—If the statute requires a joint and several bond, and a bond which is joint only is given and accepted, none of the parties can object to it, as the obligation is less burdensome;⁴ and where, under such a statute, a bond was given and accepted, which purported to bind each surety for only a specified part of the penalty, he cannot be holden for more.⁵ Where the statute requires two sureties, a bond executed by one surety only, binds him.⁶ Where an official bond is required by law to be joint and several, the discharge of one or more of the sureties does not discharge the others.⁷

§ 200. **Rulings where surety is disqualified; or officer not appointed at prescribed term of court.**—Where the statute requires the sureties in an official bond to be residents

¹ *State v Harney*, 57 Miss. 863.

² *Graham v State*, 66 Ind. 386;

McCaraher v Comm., 5 W. & S. (Pa.) 21;

S. P. *In re Read*, 34 Ark. 239;

Johnston v Gwathney, 2 Bibb (Ky.) 186;

Treasurers v Bates, 2 Bailey (S. C.) 362.

³ *Bartlett v Board of Education*, 59 Ill. 364.

⁴ *Tevis v Randall*, 6 Cala. 632.

⁵ *State v Polk*, 14 Lea (Tenn.) 1.

⁶ *Justices v Ennis*, 5 Ga. 569;
Sharp v United States, 4 Watts (Pa.) 21;

Mears v Comm. 8 Watts (Pa.) 223.

⁷ *People v Otto*, 77 Cala. 45.

of the county, wherein the duties of the office are to be performed, and provides that a bond without such resident sureties "shall be invalid and insufficient;" the bond is not void in consequence of the non-residence of any or all of the sureties, so as to enable them to defend upon that ground an action brought upon it.¹ Where the county court is required to accept an officer's bond, and the statute forbids the court to accept any bond, in which a judge of the court is a surety, the statute is deemed to be directory, and if such a bond is accepted it is valid.² Where a constable's bond fails to designate the term for which he was appointed, and he was in fact appointed for one year, at a term other than the one prescribed by law for that purpose, and he acted for the ensuing year; it was held that he and his sureties were liable upon the bond.³

§ 201. **This subject continued in next chapter.**—The subject of the validity of an official bond is necessarily, in many particulars, coincident with that of the liabilities of the sureties in such a bond, which is treated at length in the next succeeding chapter; so that the reader will find many additional cases upon the former subject, cited in that chapter.

¹ *State v Flinn*, 77 Ala. 100.

² *Shipman v McMinn*, 1 Wins. (N. C.) 122.

³ *State v Findley*, 101 Mo. 368.

CHAPTER XII

RIGHTS AND LIABILITIES OF THE SURETIES IN AN OFFICIAL
BOND

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III. *Respective liabilities of the sureties in two or more bonds, given by the same officer for successive terms, or for successive periods of the same term.*

214. This subject partly examined under the last preceding head; general rule, where there were successive terms, is that each set of sureties is liable for defaults during the term for which his bond was given.

215. But if successive bonds are given during one term, new bond is cumulative, and sureties in both liable *pro rata* for future defaults; various cases upon this subject.

216. Additional cases thereupon; exceptions to the rule.

217. Presumptions as between the sureties in successive bonds.

218. Where money is completely misappropriated during first term, only the sureties for that term are liable, although balance carried over to second term; so as to successive annual bonds during same term; cases where balances were thus declared and applied.

219. The same subject continued.

IV. *Respective liabilities of sureties in a general bond, and sureties in a special bond, given by the same officer, pursuant to a statute.*

SEC. 220. Where, in addition to his general official bond, an officer is required to give a bond for particular duties, sureties in that bond are liable only for those duties, and sureties in general bond not liable therefor. The rule illustrated by several cases.

V. *Liability of sureties of an officer, for public money received by him, and lost by theft, robbery, the act of God, or of the public enemy; the failure of a depositary; or otherwise without his negligence or other fault.*

221. Great diversity of opinion on this question; cases turning upon the peculiar language of the statute, or of the bond, whereby officer made a debtor for the money.

222. Where no such peculiar feature, the U. S. courts hold that officer is liable as a debtor, and sureties not excused where money stolen, etc.

223. Additional cases to the same effect, in the U. S. courts; exception allowed, where money was seized by the public enemy.

224. These rulings followed in several cases, decided in the state courts; accidental fire not within statute, exempting officer, from loss by "irresistible superhuman cause."

225. Rulings that officer and his sureties are liable for money lost through failure of a bank, etc.

226. Rulings to the contrary, and upholding the doctrine, that the officer and his sureties are not liable for money lost without his fault.

227. The same subject continued.

228. The same subject continued.

229. Where money, process, etc., delivered lawfully by one officer to another, the latter's sureties are, and the former's are not, liable for loss, etc., thereof.

VI. *Liability of sureties, depending upon the official or unofficial character of the act or omission, by reason whereof a claim is made against them.*

230. General rule is that officer's sureties are not liable, except where the law requires him to act; various illustrations.

231. Other illustrations of the rule, and cases where they are liable, because the law required the act to be done.

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SEC. 232. The same subject.

- 233. Various rulings upon the liability of the sureties of the clerk of a court, for money received by him.
- 234. The same, as to the liability of the sureties of a notary public.
- 235. The same, as to the sureties of a justice of the peace, or constable, with respect to the collection of demands, etc.
- 236. Sureties not liable for money received by officer, although in an official capacity, where the bond did not cover that official capacity; various illustrations of the rule; but where two offices are united, and one bond given, sureties are liable for defaults in either office.
- 237. Bonds of justices of the peace cover only ministerial acts; rulings as to the liabilities of sureties therefor.

VII. *Liability of sureties for acts of malfeasance, or wrongs committed colore officii.*

- 238. Contradictory rulings on general proposition as to sureties' liability for acts done *colore officii*.
- 239. Rulings in miscellaneous cases upon the same subject.
- 240. Weight of authority is, that sureties of sheriff, etc., are liable for seizure, etc., of goods of one person under color of process against another; instances.
- 241. Authorities on both sides of the question.

VIII. *Various other rulings as to the liabilities of sureties in particular cases.*

- 242. Liable for negligence, etc.; instances.
- 243. Condition for faithful performance; when not broken by honest mistake or want of skill.
- 244. It is broken by failure to keep correct accounts, and make correct reports, as required by law; so as to disbursements.
- 245. Question whether such accounts, etc., are conclusive against sureties, or only *prima facie* evidence.
- 246. Mere omission of county treasurer to foreclose mortgage, not a breach of his bond, unless negligence shown.
- 247. Questions as to liability for acts or omissions out of the officer's district.
- 248. Miscellaneous cases, as to liability of sureties of officer having charge of records of deeds, etc.
- 249. The same as to the sureties of a clerk of a court.

- SEC. 250. The same as to sureties of officer issuing marriage license.
251. Sureties not liable, where deficiency in accounts is only apparent; other cases of same general character; failure to keep separate accounts of separate funds, etc.
252. Miscellaneous cases, as to liability of sureties of sheriff, constable, etc.
253. Not liable for depreciation of current bank notes; tax collector's sureties liable for failure to collect taxes; grain inspector's sureties liable for failure to pay over fees.
254. Town commissioner's sureties liable for improperly issuing bonds of town.
255. Whether sureties are liable for profits, made by officer from funds in his hands.
256. Sureties of officer *de facto* not liable to officer *de jure* for emoluments of office, after ouster.
257. Sureties of officer not liable to printers for advertising; sureties of mail contractor not liable to individual for failure to transport mail.
258. Sureties not liable for a statutory penalty.

IX. *Liability of sureties, where the bond was executed, upon a condition which has not been fulfilled.*

259. General rule, in case of private contracts, that sureties are not liable, where promisee or obligee had express or implied notice of the condition; otherwise they are liable.
260. Rulings of U. S. courts, as to the rule in case of official bonds.
261. Rulings of the courts in New York on same question.
262. Rulings of the courts in Indiana, Michigan, and Iowa, on the same question.
263. Other cases elsewhere: the cases appear to hold that approving officer is chargeable with notice, as a promisee or obligee in a private contract.
264. The author's criticisms upon that doctrine; reasons why an official bond should not be invalidated by any notice.
265. Additional seal not notice *per se* that another was to execute the bond; where surety acquiesces, he waives condition; if some of sureties thus discharged, all are; but the mere addition of another surety does not affect those who have signed.

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SEC. 266. Where the principal is named in the body of the bond, but does not execute it, and it is thus accepted, the sureties are not holden, without proof that they assented.

X. *Liability of a surety, where a cosurety's signature was forged, or otherwise affixed without his authority.*

267. On this point, some conflict of authorities; but the recent cases hold that surety is liable.

XI. *Liability of sureties, as affected by a subsequent alteration of the officer's duties, or the tenure of his office.*

268. Leading English case that surety is discharged; *Pybus v. Gibb*.

269. Other English cases to the same effect.

270. Rulings of the United States courts, following English rulings.

271. American cases, holding that sureties are not discharged by alteration of duties, if new duties appropriate to office.

272. Weight of American authorities sustains this rule; cases, and qualifications.

273. Whether sureties discharged by extension of principal's term; or of time for him to account; authorities on either side of this question.

274. So where new districts added, or county re-districted.

275. Sureties' liability not affected by change of compensation; nor, in case of a postmaster, by change in postage rates; nor by a revision of ordinances, or change of mode of payment of customs charges.

276. Sureties of water works superintendent not liable, where he was required to collect water rents; or of clerk, where he was required to collect license fees.

277. The author's comments on this rule, and suggestions that it should be made broader to hold the sureties.

278. Where new duties are imposed, bond not invalidated, but sureties remain liable for original duties.

279. Sureties liable, where the new duties were imposed before the bond was given, or where bond provides for duties "now or hereafter" imposed.

XII. *Effect, upon the liability of the sureties, of the acts or omissions of other officers, including transactions between them and the principal.*

- SEC. 280. Peculiar character of obligee renders inapplicable some of the rules, governing private contracts of suretyship.
281. General rule that government is not liable for acts or omissions of officers.
282. Effect, upon liability of sureties, of settlements, etc., between principal and auditing officers.
283. The same subject; sureties not discharged by omission to proceed against principal, as required by law; or by any other laches or omissions of other officers.
284. Where bond improperly given to town treasurer, instead of town, dealings between treasurer and principal may discharge sureties; cases for and against the doctrine that they are discharged by similar dealings with nominal obligee.
285. Illegal cancellation of bond; settlement under a statute, or by authority of city council; quere, if sureties discharged; they are discharged by payment with money furnished by the principal.
286. No defence to sureties in disbursing officer's bond, that he was a defaulter when appointed; or that appointing officers falsely represented that his accounts were settled; or failed to remove him for defalcation, as required by law, etc.
287. Where collector's bond in terms covers all the county taxes, but in fact part were collected by another, who was collector *de facto*, sureties not liable.

XIII. Defences of sureties, founded upon defects in the acquisition of his office by the principal, or in proceedings to charge him.

288. All the obligors in an official bond are estopped from denying principal's title to office, or otherwise questioning his power to act therein.
289. Tax collector, receiving defective warrant, etc., may refuse to act, but his sureties are liable for taxes collected by him; so where statute was unconstitutional, etc.
290. So where rate of taxes exceeds the lawful rate; rule where collector unlawfully receives county warrants, and is credited therefor.

SEC. 291. Where sheriff collects money under execution, no defence that there was no judgment; so where tax collector collects more than was due; so where clerk receives money irregularly paid into court, etc; but *semble*, that where county illegally borrows money, sureties for collector not liable for that money.

XIV. *Miscellaneous questions, relating to the amount recoverable against sureties; the formal proceedings necessary to found an action against them; and the like.*

- 292. Some of these questions already considered; general rule that liability of principal and that of surety are co-extensive; exceptions to the rule; sureties not liable to a *particeps criminis*.
- 293. Sureties generally liable for actual damages; cases where liable only for nominal damages.
- 294. Sureties not liable beyond penalty of bond, except for interest, etc.
- 295. Sureties liable without a special demand, where it is principal's duty to pay at a specified time; otherwise where no time fixed; rule the same as to charging them with interest.
- 296. Sureties of U. S. officer liable for expense of procuring performance of neglected duties; but not for money, delivered by the government to an official agent, for transmission to principal, without proof that it came to his hands; when state may sue bond before expiration of officer's term.

I. Preliminary observations.

§ 202. **Rights against promisee or obligee under general law of principal and surety.**—The rights of sureties comprise, where the general rules of law relating to principal and surety are under consideration, many of the duties and obligations towards the sureties, which rest upon the promisee or the obligee in the contract of suretyship, and the violation of which will enable the sureties successfully to defend an attempt to enforce the contract of suretyship. And in the case of a bond given

by a deputy or other subordinate to the principal officer, to indemnify the latter against liability by the act or omission of the deputy, the contract is, for these purposes, one of a private character; and the rules referred to operate as in other cases of private contract. But the relation of the sureties toward the obligee in the bond of an officer, holding by appointment or election under the authority of the sovereign power, is peculiar and exceptional. In such a case the obligee in the bond is either the sovereign power itself, or some municipal body, exercising by statute a portion of the sovereign power, or some officer or board of officers, representing the sovereign power. This circumstance materially modifies the rules of law, relating to the rights of sureties in private contracts of suretyship. As a general rule, the sovereign power is not charged with duties or obligations to individuals; and the exercise of its authority is not controlled by any rights which they may assert, except in the cases where the constitution has expressly fixed limits to such exercise. And where the bond runs to a municipal corporation, or a public officer, the obligee is a mere representative of the sovereign power, whose rights, powers, duties, and liabilities are fixed by statute, which not only charges the sureties with notice of the extent thereof, but binds them as well as the obligee. Thus the obligee takes no power by intendment, or by his own acts or omissions, or the acts or omissions of any other person. Consequently questions, arising between the sureties and the obligee in an official bond, are properly to be regarded as part of those which relate to the liabilities, rather than the rights, of sureties. The effect of this peculiar and exceptional relation between the sureties and the obligee has been considered in some cases in the last preceding chapter, and will be considered more particularly in subsequent pages of this chapter.

§ 203. **Rights of sureties inter sese, and against principal.**—The rights of a surety against a co-surety, or of one or more sureties against the principal, or against a third person, are the same in a case of an official bond, as in the case of a private contract of suretyship.¹ In one respect, it is possible that a duty to the sureties may arise on the part of the government or an obligee representing the government. The right of the sureties in an official bond to subrogation, is the same, so far as it can be enforced, as in the case of a private contract of suretyship.² Thus, where the statute makes the official bond of a tax collector a lien, from the time of filing the same, upon the collector's real property, in favor of the state, or the municipality interested, the sureties of the collector, who have been compelled to respond for his defalcation, are entitled to be subrogated to that lien, and to enforce it, even against subsequent purchasers, without actual notice of the lien, and before any actual default.³ So the sureties in the official bond of a sheriff, on payment of a judgment recovered against him for a wrongful levy, are entitled to be subrogated to the instrument of indemnity given to him by the party.⁴ And it has been held that a surety for a debt due to the United States, is entitled, upon paying the debt, to the priority given by the act of congress to the United States, in case of insolvency.⁵ To what extent this rule

¹ Where a tax collector, at the request of one of his sureties, deposits the public money in a bank of which the surety is an officer, and the surety refuses, upon the collector's order, to pay the money to the county treasurer, the surety becomes primarily liable upon the collector's bond, as between himself, the collector, and the co-surety. *Crisfield v Murdock*, 55 Hun (N. Y.) 143.

² *Philbrick v Shaw*, 61 N. H. 356.

³ *Knighton v Curry*, 62 Ala. 404;

Schuessler v Dudley, 80 Ala. 547;

Callen v Schuessler, 86 Ala. 527;

Boltz's estate, 133 Pa. 77.

Equities, which accrued before the filing of the bond, are not affected thereby. *Crisfield v Murdock*, 55 Hun (N. Y.) 143.

⁴ *People v Schuyler*, 4 N. Y. 173, see p. 183. *Philbrick v Shaw*, 61 N. H. 356.

⁵ *Dias v Bouchaud*, 10 Paige (N. Y.) 445. On appeal the bill was dismissed on the ground, that upon the facts, there was no right to priority; s. c. 1 N. Y. 201.

would operate to discharge a surety, where the government, or the obligee, as its representative, had impaired this remedy, has not, as far as our examination has discovered, been decided by the courts.

II. Questions relating to the time, when an act or omission of the principal must have occurred, in order to render the sureties liable therefor.

§ 204. **General rule relating to this subdivision.—**

The general rule is, that unless the bond is in express terms retrospective, it binds the sureties with respect to future transactions only, and that they are not liable for any default in the condition of the bond which had already occurred, when the bond took effect;¹ whether it occurred during a previous portion of the official term for which the bond was given, or during a previous term of the same office held by the principal.² This rule is the same, where a new bond is given as a substitute for an old bond, which is cancelled; in such a case, the sureties

¹ As to the time when an official bond takes effect, see *ante* § 186.

² *Haley v Petty*, 42 Ark. 392;
State v Churchill, 48 Ark. 426;
Coons v People, 76 Ill. 383;
Stern v People, 96 Ill. 475;
Potter v School Trustees, 11 Ill. App. 280;
Dickens v State, 7 Blackf. (Ind.) 358;
Rogers v State, 99 Ind. 218;
Webster County v Hutchinson, 60 Iowa 721;
Colyer v Higgins, 1 Duv. (Ky.) 6;
Rochester v Randall, 105 Mass. 295;
Scarborough v Parker, 53 Me. 252;
Paw Paw v Eggleston, 25 Mich. 36;
Detroit v Weber, 29 Mich. 24;
Pine County v Willard, 39 Minn. 125;
Montgomery v Governor, 8 Miss. 68;
Marney v State, 13 Mo. 7;
State v Alsop, 91 Mo. 172;
Comm'rs v McCormick, 4 Monta. 115;

Van Sickel v Buffalo Co., 13 Nebr. 103;
Jeffers v Johnson, 18 N. J. L. 382;
Bissell v Saxton, 66 N. Y. 55; 77 N. Y. 191;
Board of Education v Fonda, 77 N. Y. 350;
Thomson v MacGregor, 81 N. Y. 592;
Kellum v Clark, 97 N. Y. 390;
Fitts v Hawkins, 2 Hawks (N. C.) 394;
Governor v Lee, 4 Dev. & B. (N. C.) 457;
Richardson v Smith, 2 Jones L. (N. C.) 8
State v Galbraith, 65 N. C. 409;
State v Orr, 12 Lea (Tenn.) 725;
State v Polk, 14 Lea (Tenn.) 1;
Myers v United States, 1 McLean (U. S.) 493;
Crawn v Comm., 84 Va. 282;
Vivian v Otis, 24 Wis. 518.
 For additional authorities, see notes to §§ 214 *et seq.*, *post*.

in the second bond are not liable for defaults occurring before its execution, unless the new bond so provides.¹

§ 205. **General rule that sureties liable only for defaults occurring during term for which bond given.**—And with respect to the time when the liability of the sureties expires, the general rule is, that, in the absence of any designation of another limit, either in the bond itself, or in the statute under which it is given, the sureties are responsible only for defaults of the principal, occurring before the end of the official term which he is serving, or is about to serve, when the bond takes effect.² This question often arises, where the principal has given two or more successive bonds, during successive terms to which he has been chosen, and it is necessary to determine the liability of the sureties in each of such bonds. We shall have occasion presently to consider some special cases where such bonds have been given, and also where

¹ *Thompson v Dickerson*, 22 Iowa, 360;
Myers v United States, 1 McLean (U. S.) 493.

² *Mayor v Horn*, 2 Harr. (Del.) 190;
Comm. v Hughes, 10 B. Mon. (Ky.) 160;
State v Powell, 40 La. Ann. 241;
Norridgewock v Hale, 80 Me. 362;
Heuitt v State, 6 Harr. & J. (Md.) 95;
Bigelow v Bridge, 8 Mass. 275;
Chelmsford Comp'y v Demarest, 7 Gray (Mass.) 1;
Scott Co. v Ring, 29 Minn. 398;
Lauderdale v Alford, 65 Miss. 63;
Moss v State, 10 Mo. 338;
Dover v Twombly, 42 N. H. 59;
Mayor v Crowell, 40 N. J. L. 207;
Kingston M. Ins. Comp'y v Clark, 33 Barb. (N. Y.) 136;
Kellum v Clark, 97 N. Y. 390;
Bissell v Saxton, 66 N. Y. 55; s. c. 77 N. Y. 191;
Board of Education v Fonda, 77 N. Y. 350;
Governor v Coble, 2 Dev. (N. C.) 489;
Miller v Davis, 7 Ired. (N. C.) 198;

Thomas v Summey, 1 Jones L. (N. C.) 554;
Richardson v Smith, 2 Jones L. (N. C.) 8;
Holloman v Langdon, 7 Jones L. (N. C.) 49;
State v Galbraith, 65 N. C. 409;
Gregory v Morisey, 79 N. C. 559;
State v Crooks, 7 Ohio 573;
County Comm'rs v Greenwood, 1 De-
sauss. Eq. (S. C.) 450;
Atkins v Baily, 9 Yerg. (Tenn.) 111;
Yoakley v King, 10 Lea (Tenn.) 67;
United States v Kirkpatrick, 9 Wheat.
(U. S.) 720;
United States v Nicholl, 12 Wheat. (U.
S.) 505;
Sthreshley v United States, 4 Cranch,
(U. S.) 169;
United States v January, 7 Cranch (U.
S.) 572;
United States v Spencer, 2 McL. (U.
S.) 285;
Munford v Rice, 6 Munf. (Va.) 81;
Comm. v Fairfax, 4 Hen. & Munf.
(Va.) 208;
Tyler v Nelson, 14 Gratt. (Va.) 214.

two or more successive bonds have been given during the same term.¹ At present it suffices to say, that in consequence of the rules just stated, the sureties in such bonds for successive terms are generally liable, each set of sureties for such defaults in the condition of the bond, as occurred after the bond was given, and before the expiration of the term for which it was given.

§ 206. **Exceptions to general rule, and cases where sureties were held liable for previous default.**—The few exceptions to the rule, that sureties are not liable for defaults which occurred before the bond was given, are based upon the peculiar language of the statute, under which the bond was given, or of the bond itself; or upon some peculiar circumstances attending the giving of the bond. Thus, in Massachusetts, it was held, that the sureties in the bond of a town treasurer, given after the beginning of his official term, and reciting that the principal had been chosen treasurer “for the current year,” were liable for his defaults from the beginning of the year, that being the beginning of his official term.² So a township treasurer’s sureties are liable for the principal’s defaults during his entire statutory term, although the bond was in fact intended for a shorter time, and the sureties were induced to execute it, by the principal’s representations that such would be its effect.³ And it has been held that persons, who, in September, added their names as sureties in a sheriff’s bond filed in the preceding February, were liable as if they had executed it when it was filed.⁴ But, in another case, it was held that the execution of an official bond by others as sure-

¹ Many of the cases, cited in the preceding notes to this section, involve this question.

See also *post*, §§ 214-219.

² *Hatch v Attleborough*, 97 Mass. 533.

See also *Conover v Middletown*, 42 N. J. L. 382.

³ *Ladd v Town Trustees*, 80 Ill. 233.

⁴ *Comm. v Adams*, 3 Bush (Ky.) 41.

ties, after the filing thereof, was unwarranted by law, and did not bind the additional sureties for want of delivery.¹ And where a collector of customs was appointed by the President on the 13th of November, 1852, to fill a vacancy, the senate not being in session; and on the 16th of December, in the same year, executed the bond on which this action was brought; and on the 16th of January, 1853, during the session of the senate, was appointed, by and with the advice and consent of the senate, for a term of four years; it was held that, under the peculiar language of the bond, given under the act of 1799, the sureties were liable for his acts as collector from the time of his appointment; but as depository of public moneys and fiscal agent of the United States, under the act of 1846, the sureties were liable only for future acts; and that the sureties were not liable, in either capacity, for acts of the principal after his appointment in January, 1853; that the first appointment would have expired with the close of the session of the senate in March, 1853, if it had not been superseded by the second; but the second appointment was a new and distinct appointment, the acceptance of which was a surrender and superseding of the first; and that the liability of the sureties for the principal's acts, either as collector or as fiscal agent, ceased upon such acceptance.²

§ 207. **General language of condition does not vary rule as to defaults beyond term.**—The rule, that the liability of the sureties in an official bond, where the term of office is for a definite time, cannot be extended to defaults beyond that time, is not varied by the fact that the language of the condition is broad enough to cover a longer period. Thus, in an English case, where

¹ *Hyner v Dickinson*, 32 Ark. 776.

² *United States v Ellis*, 4 Sawyer C. C. (U. S.) 590.

the postmaster-general had appointed a person to be deputy postmaster "for the term of six months;" and he gave a bond conditioned for faithful performance of his duties "for and during all the time" that he should continue deputy postmaster; and he was continued in office beyond the six months; it was held that the surety was not liable for the increased term, Lord Hale remarking that "the condition shall refer to the recital only, by which the defendant was bound for six months and not longer," for the reason stated by counsel, namely, that otherwise the surety might be bound during the whole life of his principal, which would be "unreasonable to suppose."¹ But, in an American case, it was held that the sureties in an official bond, where the law does not limit the officer's term, are liable for his acts and omissions as long as he actually holds the office.²

§ 208. **Practical application of rule; evidence; estoppel; and various rulings.**—The practical application of the rule, that those sureties are liable for the principal's default in the condition of the bond, whose undertaking covered the time when the default took place, is not always free from difficulty. In an action upon the bond, the sureties are not precluded from showing that the defalcation, for which it is sought to charge them, occurred before the bond was given, although the circumstances are such, that the principal would be estopped from so showing.³ But the cases are not always harmonious, respecting the time when the law pronounces the principal to be in default, upon a given state of facts. Thus

¹ Lord Arlington v Merricke, 2 Saund. 411 a.

See also Liverpool Waterworks Comp'y v Atkinson, 6 East. 507; 2 Smith, 654;

Peppin v Cooper, 2 B. & A. 431;
Bamford v Iles, 3 Exch. 380;

Kitson v Julian, 4 Ell. & B. 854; 24 L. J., Q. B., 202; 1 Jur. N. S. 754;
Hassell v Long, 2 M. & S. 363.

² State v Baldwin, 14 S. C. 135.

³ Webster County v Hutchinson, 60 Iowa 721.

it has been held in many cases, that where an officer held money, at the time when the bond was given, but he was not then in default for not having paid it over, and such a default occurred after the bond was given; the sureties are liable for the money; and, on the other hand, if a bond had been previously given, which was in force when the money was received, but did not cover the time when the default occurred, the sureties in that bond are not liable for the money.¹ Thus it was held, in an action upon the bond of a marshal, given after the receipt by him of money due to the United States, and of directions from the comptroller to deposit it in a bank, that the sureties were not liable for that money, although it was still in the marshal's hands when the bond was given, as the defalcation had occurred before.² But in another case, it was held, that the neglect of the clerk of a court to deposit or pay over money, as ordered by the court, is a continuing default, for which sureties in a bond given afterwards are liable.³ And where it was ordered by a decree that infants' money be paid to the clerk, to be by him invested, etc., it was held that the sureties of the clerk in the bond, which was in force when the decree was made, were liable for the money, without regard to the time when the money was received.⁴ And where a demand was put into a constable's hands for collection in 1839, and he committed a breach of duty in not collecting it that year, and was reappointed for 1840, and committed a like breach during that year; it was

¹ *Governor v Robbins*, 7 Ala. 79;
Dumas v Patterson, 9 Ala. 484;
Moore v Madison County, 38 Ala. 670;
State v Van Pelt, 1 Ind. 304;
Treasurers v Taylor, 2 Bailey (S. C.)
 524;
Myers v United States, 1 McLean (U.
 S.) 493;
Farrar v United States, 5 Pet. (U.S.) 373;

Bruce v United States, 17 How. (U. S.)
 487.

² *United States v Giles*, 9 Cranch (U. S.)
 212.

³ *State v Moses*, 18 S. C. 366;
 See *Yockley v King*, 10 Lea (Tenn.) 67.

⁴ *State v Fagan*, 6 Jones L. (N. C.) 62.

held that the injured person had an election to resort to either bond, or to both bonds, and that he might recover his full damages in either suit.¹ Where money was received by a sheriff upon a sale under an attachment, during his term of office, the sureties on his bond were holden for it, although it was not due or demanded till after the expiration of his term.²

§ 209. **Rulings as to liability, where officer acted partly in one, and partly in another term.**—On the other hand, it has been held, that where a constable receives an execution during his first term, returnable after the expiration of that term; and he is chosen for a second term, and gives a bond for that term; the sureties in the bond for the first term are not liable for his failure to pay over the money on the return day, because the default did not occur during the term covered by their bond.³ And in an action upon the bond of a school district collector, dated November 13, 1868, conditioned for the faithful discharge of the duties of collector, it appeared that the collector had received, and disbursed as required by law, the school moneys, except a balance which he reported, as being in his hands, to the town meeting in October, 1869; at which meeting he was reelected for another year, and gave another bond. The statute required the collector to keep in his hands the money collected by him, to be paid out by him upon the order of the school trustees, and to pay over any balance in his hands to his successor. In December, 1869, a draft was made upon the collector by the school trustee, which he refused to pay, although the money to pay the same was in his hands, being part of the balance so reported by him; whereupon this action was brought. A judgment for

¹ *State v Wall*, 9 Ired. L. (N. C.) 20.
See also *White v Smith*, 2 Jones L. (N. C.) 4.

² *King v Nichols*, 16 Ohio St. 80;
Brobst v Skillen, 16 Ohio St. 382.

³ *Warren v State*, 11 Mo. 583.

the plaintiff was reversed. The court said that the only breaches of the bond by the collector, which could be insisted upon, were, first, the refusal to pay the draft, and secondly, the failure to pay over the balance in his hands to his successor in office. As to the first, the refusal did not occur till after the expiration of the term for which the bond in suit was given; but in the second year, and while the second bond was in force. And as to the second breach, inasmuch as he was his own successor, the condition could not be performed.¹ It has been ruled in Pennsylvania, that the surety in an official bond of a treasurer is liable for a balance in his hands, at the expiration of his term, although he was reëlected, and continued to hold the office, without giving a bond for the new term, and during the new term he embezzled the money, the defalcation not having been discovered until after his successor was chosen, and had qualified.²

§ 210. **The same subject; cases where execution of process began in expired term.**—Where a sheriff, constable, or marshal receives process for execution, and he has commenced to execute it before the expiration of his term, he is, in general, bound to complete it after the expiration of his term, and for that purpose the liability of the sureties in his bond is extended accordingly; and if he has been again chosen, and has given another bond, the sureties in the first bond are, and the sureties in the second bond are not, liable for his default relating thereto.³ But where he has not levied, the sureties in the second bond are liable for his not returning an execution.⁴ The sureties in a sheriff's bond, or, if he holds for two terms, those in his first bond, are liable for his

¹ Overacre v Garrett, 5 Lans. (N. Y.) 156.

Tyree v Wilson, 9 Gratt. (Va.) 59.

² Black v Oblender, 135 Pa. St. 526.

⁴ Sherrell v Goodrum, 3 Humph. (Tenn.) 419;

³ Elkin v People 4 Ill. 207;

State v Roberts, 12 N. J. L. 114;

Accord, State v Morgan, 59 Miss. 349.

Governor v Cobb, 2 Sneed (Tenn.) 18;

See also McNeen v Sewell, 14 Nebr. 532.

failure to deliver attached property or pay the judgment, although the default occurred after the expiration of his term.¹ Where a sheriff lost, through neglect, money which he had collected under an execution, the sureties, whose bond covered the time of the levy, were charged with the loss, although he had since given a new bond.² And where a sheriff sold real property in partition, during his first term, and received the money during the second term; it was held that the sureties for the second term were liable for the money.³

§ 211. **Money received at date of bond; resignation.**—It has been held, that the sureties in an official bond are liable for money, received by the principal on the day of the date of the bond, in the absence of proof that it was received before the bond was actually given, although the officer had previously been acting under another bond.⁴ Where the officer's official term is shortened by his resignation, it has been said that his sureties are not liable for his acts or omissions, occurring after his resignation is received at the proper department; but *semble*, that, if the resignation takes effect only upon the appointment of his successor, the sureties continue to be liable until the successor is appointed.⁵ Doubtless this ruling is subject to the same qualifications, as that which restricts the liability of sureties to the completion of the statutory term, for which the bond was given.

§ 212. **Wrongful holding over without new bond.**—Where a county treasurer was elected for a term of two years, and by statute he held over until his successor should be elected and should qualify; and the same person was elected for another term, but continued to hold

¹ *Baker v Baldwin*, 48 Conn. 131.

² *Miller v Comm.*, 8 Pa. St. 444.

³ *Wooddell v Bruffy*, 25 W. Va. 465.

⁵ *United States v Wright*, 1 McL. (U. S.) 509.

⁴ *Ingram v McCombs*, 17 Mo. 558.

the office, without giving a new bond; it was held, that the sureties in the bond given for his first term were not liable for his acts during the second term, on the ground that, by statute, a failure to qualify within a certain time after election, created a vacancy, to be filled by the county judge; so that the treasurer held over wrongfully, and was an officer *de facto* only.¹ In another case, where a judge of probate held over wrongfully, and while so holding over, collected a security which he had rightfully received during his term of office, it was held that his sureties were liable for the money.²

§ 213. **Rule where officer rightfully holds over without new bond.**—But whatever may be the true rule, in the case of a wrongful holding over, the weight of American authority sustains the proposition, that where an officer holds over rightfully, that is, pursuant to a statute providing that he shall hold over until his successor shall be chosen, or shall be chosen and shall qualify; this constitutes one of the exceptions to the rule, that the liability of the sureties in an official bond does not extend beyond the principal's term, and that the sureties are liable for his defaults during the additional time.³ And it has

¹ Wapello County v Bigham, 10 Iowa, 39.
Accord, Rany v Governor, 4 Blackf.
(Ind.) 2;

Scott County v Ring, 29 Minn, 398;
Tuley v State, 1 Ind. 500;
Bennett v State, 58 Miss. 556.

² Whitmire v Langston, 11 S. C. 381.

³ Akers v State, 8 Ind. 484;
Thompson v State, 37 Miss. 518;
State v Wells, 8 Neva. 105;
United States v Jameson, 3 McCrary,
(U. S.) 620.
Contra, Mayor, etc., v Horn, 2 Harr.
(Del.) 190;
Bigelow v Bridge, 8 Mass. 275.
In a recent case, it was held, that
where a town treasurer misappro-

priated public funds, on the day after the expiration of his annual term, and before the qualification of his successor, his sureties were not liable, although the bond was conditioned for faithful performance "until another is chosen and sworn in his stead;" on the ground that such a clause does not, like a statutory provision of the same import, extend the liability beyond the term. Norridgewock v Hale, 80 Me. 362, citing to this proposition, Amherst Bk. v Root, 2 Met. (Mass.) 522; Chelmsford Comp'y v Demarest, 7 Gray (Mass.) 1; Dover v Twombly, 42 N. H. 59.

even been held, that where an officer's term is extended by statute, he becomes his own successor, and his sureties' liability continues until he qualifies anew.¹ But the sureties' liability, where an officer holds over, cannot be extended indefinitely. It lasts only for a reasonable time for the successor to be chosen, or to qualify, as the case may be.² And where the appointing power wilfully refuses to appoint the principal's successor, and thus continues the latter in office, beyond a reasonable time for such appointment and the successor's qualification, the sureties are discharged.³

III. Respective liabilities of the sureties in two or more bonds, given by the same officer, either for successive terms, or for successive periods of, or otherwise at different times during, the same term.

§ 214. **Former examination of subject; general rule as to successive terms.**—The rulings, considered in the last preceding division, have been, in many instances, made in cases where the question now specially to be considered has arisen. It results obviously from the rule, as stated in that division, and it has been expressly adjudged in numerous decisions, that where an officer is chosen for a new term of the same office, and gives a new bond for such term, the sureties in the bond for the former term are discharged, except for such defaults as had previously occurred; and the sureties in the new bond are

¹ *State v Kurtzeborn*, 9 Mo. App. 245; 73 Mo. 98.

See, however, cases in note ¹ to last preceding section.

² *Montgomery v Hughes*, 65 Ala. 201.

See also *Scott County v Ring*, 29 Minn. 388.

³ *Rahway v Crowell*, 40 N. J. L. 207.

Mutual Loan Ass'n v Price, 16 Fla. 204; See also, upon the general proposition, *Mayor, etc., v Horn*, 2 Harr. (Del.) 190;

Wapello County v Bigham, 10 Iowa, 39;

Chelmsford Comp'y v Demarest, 7 Gray (Mass.) 1;

Treasurer v Mann, 34 Vt. 371.

liable only for defaults occurring during the new term.¹ Or, as was said in an adjudication by the supreme court of Michigan, if an officer has held office during two or more successive terms, the respective liabilities of the sureties in his official bonds for the successive terms, are "to be determined by considering the term for which they were sureties by itself, precisely as if he had succeeded some other person."² But it has been held that the sureties in the bond for the preceding term, are not discharged, until the new bond is approved, that is, until the approval is complete, by having been made by all the officers who are required by law to approve it.³

§ 215. **Successive bonds during single term; cases.**— But if an officer, during the same term, and pursuant to the requirement of a statute, or of another officer empowered by law to make such a requirement, gives a new bond, the general rule is that such new bond is cumulative, and does not release the sureties in the former bond from liability for future defaults; but that the two bonds are liable *pro rata* for such future defaults.⁴ Thus it has

¹ *People v Aikenhead*, 5 Cala. 106;
Coons v People, 76 Ill. 383;
Stern v People, 96 Ill. 475;
Webster County v Hutchinson, 60 Iowa 721;
Bigelow v Bridge, 8 Mass. 275;
Pine Co. v Willard, 39 Minn. 125;
Lewenthal v State, 51 Miss. 645;
Hoboken v Kamena, 41 N. J. L. 435;
State v McNeill, 74 N. C. 535;
Com'rs v Greenwood, 1 Desauss. (S.C.) 450.
South Carolina Soc. v Johnson, 1 McCord (S. C.) 41;
South Carolina Ins. Company v Smith, 2 Hill (S. C.) 589;
State v Wade, 15 W. Va. 524.

² *Detroit v Weber*, 29 Mich. 24.

³ *State v Wells*, 61 Tex. 562.

⁴ *New Orleans v Gauthreaux*, 36 La. Ann. 109;
State v Sappington, 67 Mo. 529; s. c. 68 Mo. 454;
Poole v Cox, 9 Ired. L. (N. C.) 69;
Moore v Boudinot, 64 N. C. 190;
State v Crooks, 7 Ohio 221;
United States v Hoyt, 1 Blatchf. (U. S.) 326;
United States v Anderson, 1 Blatchf. (U. S.) 330;
Postmaster General v Munger, 2 Paine (U. S.) 189.

A new bond ordered by the county commissioners is cumulative to the former bond, although one of the sureties on the old bond is dead. *Finch v State*, 71 Tex. 52.

been held, under the statutes of North Carolina, that where an officer's term extends for more than one year, the successive annual bonds, required to be given by him, are cumulative, so that the first covers the whole term, and the succeeding bonds are additional securities, each for so much of the term as remains when it is given; and the sureties are liable to contribution *inter sese*, in a ratio to be determined by the aggregate of the penalties of all the bonds, and the amount of the penalty of the bond signed by each.¹ In Tennessee, it has been held, that where a sheriff, having collected part of the taxes, was required, before the day of payment, to give a new bond, the sureties in that bond were liable for money previously received by him;² and that the sureties in a tax collector's bond, given in 1874 for the full term, were liable for a deficit in the taxes of 1875, although the time for the payment of the taxes of 1874 was extended, and the sureties failed to comply with a statute, allowing them to consent to continue to be bound, so that a new bond was taken for the taxes of 1874.³ In Illinois, it was held, where an officer had until June 1, as the time in which to account for money received by him; and on the 16th of March gave a new bond, pursuant to proceedings to compel him to do so, instituted by his sureties under a statute; that the former sureties were liable for money received by him before the 16th of March, and not accounted for.⁴

§ 216. **Additional cases; exceptions to the rule.**—In order that a new bond shall have the effect to release the sureties in a former bond, given for the same term, such

Poole v Cox, 9 Ired. L. (N. C.) 69;

Moore v Boudinot, 64 N. C. 190.

See also Bell v Jasper, 2 Ired. Eq. (N. C.) 597;

Oats v Bryan, 3 Dev. L. (N. C.) 451;

² Miller v Moore, 3 Humph. (Tenn.) 189.

³ Chandler v State, 1 Lea (Tenn.) 296,

⁴ Cullom v Dolloff, 94 Ill. 330.

Accord, Jones v Gallatin Co., 78 Ky. 491.

an intent must be expressed in the new bond, or must appear from the statute, or by other sufficient proof: where such an intent does not appear, the new bond is cumulative.¹ But where the new bond recites that it is in lieu of the former bond, the sureties therein are liable for the entire term of the principal.² Where the rules of the United States treasury department required an accounting, before a new bond could be accepted in substitution of a former bond; and a pension agent applied to give a new bond, and received permission so to do, and gave the bond accordingly; but it was not approved till two months afterwards, and he resigned two days after the approval, without having accounted, it was held that the approval did not effect the substitution, and the former sureties were liable for a deficiency.³

§ 217. **Presumptions as between the sureties in successive bonds.**—As respects the sureties in successive bonds, the presumption is, that those whose bond covered the time when the money was received, are liable for their principal's default; if he is chosen for another term, the burden is upon them to show such facts, as will be equivalent to a payment by him to himself as his own successor.⁴ And it has been held, that, in the absence of any proof showing when the default occurred, the presumption is that it occurred during the last term, and the sureties for that term have the *onus* of showing that it occurred in a former term.⁵ It has also been held, that the sureties in the bond for the second term are presumptively liable for a balance, appearing to be due at the end of the first term, as the officer is supposed, in the absence of proof to the contrary, to have had the money in his

¹ *People v Cushing*, 36 Hun (N. Y.) 453.

² *State v Finn*, 23 Mo. App. 290.

³ *United States v Haynes*, 9 Ben. (U. S.)
22.

⁴ *State v Smith*, 95 N. C. 396.

⁵ *Pine Co. v Willard*, 39 Minn. 125;

Kelly v State, 25 Ohio St. 567.

See also *Heppe v Johnson*, 73 Cala.
265;

Bruce v United States, 17 How. (U. S.)
437.

hand at the beginning of the second term.¹ And where an officer, holding for several years by successive annual appointments, gave successive annual bonds, it was held, that all the money, which had come to his hands during the entire time, and was not duly accounted for, might be recovered in an action upon the last bond, in the absence of evidence that it had been misapplied or wasted during previous years.² But other cases hold, that where a person has served as tax collector for two or more successive terms, or has given a new bond for each successive year of his term; and at the end of the term, or of the last term, there is a deficiency, but there is no evidence to show when it commenced or occurred; the deficiency must be apportioned on all the bonds in proportion to the sums "collected by the collector on each commitment."³ The sureties of a town treasurer, in his bond for his first term, are liable for money received during that term which he did not, at the commencement of the second term, hold officially and as town money, and had not lawfully paid out during the first term.⁴

§ 218. **Money appropriated during first term; balance carried over; cases.**—Where it appears that an officer, who has served two successive terms, completely misappropriated, before the beginning of the second term, money which he received during the first term; the sureties in the first bond are, and the sureties in the second bond are not, liable for such money, although the balance was carried over by the officer to the second year, and charged to himself in his accounts for that year.⁵ And where

¹ Fox v McCord, 54 Iowa, 346.
See also, Haley v Petty, 42 Ark. 392;
Hartford v Franey, 47 Conn. 76;
People v Shannon, 10 Ill. App. 364;
Goodwine v State, 81 Ind. 109.

² State v Stone, 7 Jones L. (N. C.) 382.

³ Phippsburg v Dickinson, 78 Me. 457;

See also, State v Churchill, 48 Ark. 426.

⁴ Cairns v O'Brien, 40 Wis. 469

⁵ McIntyre v Sch'l Trust's, 3 Ill. App. 77.
See also, Bissell v Saxton, 66 N. Y. 55;
s. c. 77 N. Y. 191;

Supervisors v Bristol, 99 N. Y. 316.

successive annual bonds were given by an officer during the same term, and each year the officer debited himself with the balance; it was held that the sureties for each year were liable for the money in his hands during that year.¹ Where a person was town treasurer, for five successive terms of one year each; and served for the first four years without any bond, but at the beginning of the fifth year gave a bond for that year; it was held, that his sureties were not liable for his appropriation to his own use, during the first year, of money for which he falsely credited himself in his account of that year, as disbursed by him, and which he did not again enter in any of his subsequent accounts.² But where a town treasurer has held the office for several successive yearly terms, giving a new bond each year; and at the beginning of the year, for which the bond in suit was given, reported a balance due from him, and afterwards charged himself with money collected, and credited himself with money paid, during that year; the credits may, in an action against the sureties, be applied towards the payment of the balance due at the beginning of the year, although the treasurer was then a defaulter for that sum.³ And where the officer has not made any application, sums received generally from him will be applied to extinguish the earliest charges against him; and the sureties for the last year will be holden for the balance thus ascertained.⁴

§. 219. **The same subject.**—Where a tax collector has held office for two successive years, and has made up his arrears for the first year, with money collected during the second year, the sureties for the second year cannot deduct that money from his defalcation.⁵ The general rule is, that where a deficiency for one term has been cov-

¹ *Miller v Macoupin County*, 7 Ill. 50.

² *Rochester v Randall*, 105 Mass. 295.

³ *Egremont v Benjamin*, 125 Mass. 15.

⁴ *Sandwich v Fish*, 2 Gray (Mass.) 298;
Frost v Mixsell, 38 N. J. Eq. 586.

⁵ *Colerain v Bell*, 9 Met. (Mass.) 499.

ered up by money received during a second term, the sureties in the bond for the second term are liable for that money.¹ In some cases it has been held, that money received in one year cannot be applied, by an arrangement between the tax collector and the treasurer or selectmen, upon a balance due for the previous year, to the prejudice of the sureties for the year when it was received.² Where a school officer, upon going out of office, gave his note to his successor for the balance in his hands; and, after the lapse of two years, having been reappointed, received the same note back as part of the school fund, and gave a release to his predecessor; it was held that the sureties in his last bond were liable for the money.³

IV. Respective liabilities of sureties in a general bond, and sureties in a special bond, given by the same officer, pursuant to the requirement of a statute.

§ 220. **General and special or particular bonds; respective liability of sureties.**—It is now well settled in this country, that where a statute prescribes that an officer shall, in addition to his general official bond, give a bond, conditioned for the performance of duties particularly specified, which devolve upon him; the sureties in the special bond are liable only for defaults in the performance of the particular duties, covered by that bond, and the sureties in the general bond are not liable for

¹ Cook v State, 13 Ind. 154;
Rogers v State, 99 Ind. 218;
State v Powell, 40 La. Ann. 234;
Pine County v Willard, 39 Minn. 125;
Lauderdale v Alford, 65 Miss. 63;
State v Sooy, 39 N. J. L. 539;
United States v Boyd, 15 Pet. (U. S.)
187;
Lyndon v Miller, 35 Vt. 329;
Crawn v Comm. 84 Va. 282.

See also Gwynne v Burnell, 7 Clark &
F. 572; 6 Bing. N. C. 453; 1 Scott N.
R. 711.

² Boring v Williams, 17 Ala. 510;
Porter v Stanley, 47 Me. 515.
See, however, Readfield v Shaver, 50
Me. 36.

³ Cooper v Cherry, 8 Jones L. (N. C.) 323.

those defaults. Thus, in Pennsylvania, it was held, that the official bond of the register of wills did not cover his duties and receipts, under the collateral inheritance tax laws, although the bond was given since those laws were passed, and those duties and receipts would appear to be included in the terms of the bond; because those laws contained a provision, requiring the register to give a special bond for the performance of his duties under them, and provided a mode to enforce the giving thereof; and that this result was not affected by the fact, which appeared in the case, that the register had never filed a bond for collateral inheritance tax, as required by the statute. "It seems to us very plain, therefore," said the court, "that the general bond is not intended to secure either payment of these collections or the giving of the special bond to secure them."¹ The rule, that the sureties in the general bond are not liable for the duties covered by the special bond, and *vice versa*, has been affirmed in several other cases;² and it has been held that the same result follows, where the statute, prescribing new duties and requiring a new bond, was passed after the general bond was given; and another statute made all official bonds liable for duties, imposed by subsequent statutes.³ And where, in a county, there is a special fund, and a special bond for its protection, payments out of the special fund, of general demands against the county, are breaches of the special bond; and a formal, without an actual transfer of money, from the special fund to the general fund, does not discharge the sureties in the special bond, or charge the sureties in the general bond.⁴ Where a county treasurer

¹ *Comm. v Toms*, 45 Pa. St. 408.

² *Morrow v Wood*, 56 Ala. 1;
White v East Saginaw, 43 Mich. 567;
State v Young, 23 Minn. 551;
County Commissioners v Tower, 28
 Minn. 45;
State v Felton, 59 Miss. 402;

State v Bateman, 102 N. C. 52;
State v Starnes, 5 Lea (Tenn.) 545;
Broad v Paris, 66 Tex. 119;
Supervisors v Ehlers, 45 Wis. 281;
Supervisors v Pabst, 70 Wis. 352.

³ *Morrow v Wood*, 56 Ala. 1.

⁴ *Supervisors v Pabst*, 70 Wis. 352.

was required by statute to increase his bond, before receiving the poll taxes, and failed so to do; it was held that the sureties in his bond were not liable for the poll taxes.¹ In an action on the official bond of a township trustee, it is proper to charge the trustee with the amount overdrawn by him from the special funds in his hands, and to credit him with the amounts overpaid by him to the general fund, for which vouchers are produced; and it is immaterial whether the sureties furnished the money for the overpayments, or whether the money came from the misapplication of the other funds, if the defendants were compelled to make good the deficiency occasioned by the misapplications, as they were required to do by the judgment.² In an action upon the general official bond of a city treasurer, where it appeared that the general fund and the school fund had been mingled by the treasurer, and the aggregate default, and the aggregate of both funds, and of the school fund, were known; it was held that the sureties were not liable for the school fund, and that, the two funds having been mingled, "a pro rata of the loss should be borne by each fund," so that the sureties were liable for the proportional loss of the general fund.³

V. Rulings relating to the liability of the sureties of a public officer, for public money received by him, and lost, while in his hands, by theft, robbery, the act of God or of the public enemy; the failure of a depositary; or otherwise without negligence or other fault on his part.

§ 221. **Great diversity of opinion upon this question; cases.**—The question whether an officer, and consequently his sureties, are liable for such a loss, has given rise to so much diversity of opinion, that it is impossible

¹ *Morrow v Wood*, 56 Ala. 1.

See also, *Woodall v Oden*, 62 Ala. 125.

² *State v Finney*, 125 Ind. 427.

³ *Britton v Fort Worth*, 78 Tex. 227.

to reconcile the adjudications thereupon. A few of such adjudications turn upon the peculiar language of the bond, or of the statute under which it was given. Thus, in a state where the courts have leaned to the opinion that the officer and his sureties are not liable for such a loss, in the absence of a statutory provision imposing a liability therefor upon them, it was held, that in the particular case of the tax collector of a town, the effect of the statutes was to render him a debtor to the town for the amount of the taxes, which he was required by his warrant to collect, and to provide the manner in which that debt was to be discharged; and therefore that it was no defence to an action upon his bond, that the money had been stolen from his dwelling house, without his fault.¹ On the other hand, where a county treasurer's bond was conditioned to "exercise all reasonable diligence and care, in the preservation and care of the moneys, books," etc., "appertaining to his office," and also "to pay over promptly to the person or officer entitled thereto, all moneys which may come to his hands by virtue of his office;" it was held, after a consideration of all the cases on the subject, which had been reported at the time, that, under the peculiar language of the treasurer's bond, he was not liable for public money received by him, and stolen from him, without want of diligence or care on his part.² But where the bond in terms renders the principal a debtor for the money received by him, he and his sureties are absolutely bound to respond for the money; and its loss without the principal's fault is no defence; a proposition which is much more easily stated, than practically applied, in view of the different rulings upon the language of particular bonds."

¹ *Muzzy v Shattuck*, 1 Denio (N. Y.) 233.
See also *Fake v Whipple*, 39 N. Y. 394
aff'g 39 Barb. (N. Y.) 339;
Looney v Hughes, 26 N. Y. 514, aff'g 30

Barb. (N. Y.) 605.

² *Ross v Hatch*, 5 Iowa, 149.

³ *Union Township v Smith*, 39 Iowa 9;
State v Moore, 74 Mo. 413.

§ 222. **Ruling of the U. S. supreme court.**—Where, however, there are no statutory provisions rendering the case exceptional, and the bond is in the usual form, conditioned for faithful performance of the officer's duty, with or without an additional condition for faithful disbursement and accounting, or the like, the courts of the United States and of several of the states regard a receiving and disbursing officer as a debtor for, or insurer of, the public money in his hands, and refuse to allow him or his sureties to escape liability therefor, although it is stolen, or lost, or taken from him by irresistible force, and without his fault. In the leading case in support of this doctrine, it was held by the United States supreme court, that where a receiving and disbursing officer of the government has given a bond, with sureties, conditioned for the faithful performance of his duties, and the safe keeping of, the due accounting for, and the payment over of, all moneys which he may receive; he and his sureties cannot escape from liability, by proof that the money in his hands was stolen from him, without fault or negligence on his part. It was said that the law of bailments is not applicable to such a case; that the liability of the officer arises out of his bond, which has been broken, since the officer failed to pay over the money; and also rests on grounds of public policy. With respect to the latter ground, Mr. Justice McLean, delivering the opinion of the court, said: "Every depositary of the public money should be held to a strict accountability; not only that he should exercise the highest degree of vigilance, but that he should keep safely the moneys which come to his hands. Any relaxation of this condition would open a door to fraud, which might be practiced with impunity. A depositary would have nothing more to do, than to lay his plans and arrange his proof; so as to establish his loss without laches on his part. Let such a principle be applied to our postmasters,

collectors of the customs, receivers of public moneys, and others who receive more or less of the public funds, and what losses might not be anticipated by the public?"¹

§ 223. **Additional U. S. cases; exception where money seized by public enemy.**—This principle has been re-affirmed and applied, under a variety of circumstances, by the courts of the United States in subsequent cases.² The only exception, which the federal courts have allowed, to the liability of the officer and his sureties for money received, and not accounted for and paid over, is where the officer was prevented from doing so by the act of God or the public enemy. Thus, where the money in the hands of a collector was forcibly seized by the insurgent authorities, during the civil war, against the will, and without fault or negligence of the collector, it was held that he and his sureties were not liable therefor.³ But, in the absence of any physical coercion, it is no defence that the officer paid money in his hands upon an order from the Confederate States, although he was then within the confederate lines.⁴

§ 224. **Rulings followed in several cases by state courts; irresistible superhuman cause.**—The courts of many of the states have followed, in several cases, this ruling, with respect to the liability of the sureties of an officer for

¹ U. S. v Prescott, 3 How. (U. S.) 578.

² United States v Morgan, 11 How. (U. S.) 154;

United States v Dashiel, 4 Wall. (U. S.) 182;

United States v Keebler, 9 Wall. (U. S.) 83;

Boyden v United States, 13 Wall. (U. S.) 17;

Bevans v United States, 13 Wall. (U. S.) 56.

By the act of Congress of May 9, 1886, the court of claims is authorized to

decree relief to a disbursing officer, who has lost government money, "without fault or neglect on his part." See Whittelsey v United States, 5 Ct. of Cl. (U. S.) 452; Malone v United States, id. 486.

³ United States v Thomas, 15 Wall. (U. S.) 337;

United States v Humason, 6 Sawyer (U. S.) 199.

⁴ United States v Keebler, 9 Wall. (U. S.) 83.

money lost or stolen, or of which he was robbed, while it was in his hands.¹ One of the state rulings even refuses to acknowledge an exception from the act of God or the public enemy;² and a territorial ruling holds that the sureties are liable, although the officer was murdered, as well as robbed,³ a feature of the case which might well take it out of the principle of public policy, established in the United States courts. Where a statute exempted an officer and his sureties from any loss, arising from "irresistible superhuman cause," it was held that an accidental fire, not caused by lightning, whereby the money was destroyed, was not within the statutory exception, although the officer (a county treasurer) had requested the county to furnish him a safe.⁴

§ 225. **Rulings in case of failure of bank, etc.**—So it has been held, that where public money has been deposited by an officer in a bank, and is lost by the failure of the bank, the officer and his sureties are liable for the money, although the bank was then in good credit, and the officer was not chargeable with want of care⁵ and

¹ *Halbert v State*, 22 Ind. 125;
Morbec v State, 28 Ind. 86;
Rock v Stinger, 36 Ind. 346;
Taylor v Morton, 37 Iowa 550;
Hancock v Hazzard, 12 Cush. (Mass.) 112;
Redwood County v Tower, 28 Minn. 45;
Board of Education v Jewell, 44 Minn. 427;
State v Moore, 74 Mo. 413;
County Com'rs v Lineberger, 3 Monta. 231;
State v Nevin, 19 Neva. 162;
New Providence v McEachron, 33 N. J. L. 339.
State v Harper, 6 Ohio St. 607;
Comm. v Comly, 3 Pa. St. 372.

² *State v Clarke*, 73 N. C. 255.

³ *United States v Watts*, 1 New Mex. 553.

⁴ *Clay County v Simonsen*, 1 Dak. Ter. 403.
 See also *Union Township v Smith*, 39 Iowa 9.

⁵ *Lowry v Polk County*, 51 Iowa 50;
Perley v Muskegon Co., 32 Mich. 132;
State v Powell, 67 Mo. 395;
Havens v Lathene, 75 N. C. 505;
Hart v Poor Guardians, 81* Pa. St. 466;
Nason v Poor Directors, 126 Pa. St. 445;
 See also, *Wilson v Wichita County*, 67 Tex. 647;
Supervisors v Kaime, 39 Wis. 468.
 See also, *Ward v School District*, 10 Nebr. 293.

although the deposit was necessary for the safety of the funds.¹

§ 226. **Rulings upholding contrary doctrine and exempting officer and sureties.**—Other well considered cases uphold the contrary doctrine, to wit, that an officer and his sureties are not liable for money in his hands, and lost without his negligence or other default, where there is nothing in the statute, or the terms of the bond, to impress upon him the character of a debtor or of an insurer.² In New York, where, as we have already shown,³ a tax collector is deemed, by the peculiar provisions of the statute, a debtor for the taxes, even before collection, it was held, that the sureties of a county treasurer are not liable for money stolen from his office, without fault on his part.* Some doubt has been thrown upon the authority of this case, chiefly by reason of the subsequent decisions of the United States supreme court; and in the most recent case on the subject in that state, the court said that the question was still probably open. In the case referred to, it was held that a surrogate, who received officially money of the estates in his hands, is bound only for good faith and reasonable diligence; and where, pending proceedings to determine who was entitled to such money, the surrogate deposited it with a private banker of good credit, who failed, and the money

¹ *State v Moore*, 74 Mo. 413.

² The only English case that we have found, which bears directly upon this question, arose upon the bond of the treasurer of a building society. It was held that he was a bailee of the money, not a debtor; and that if he was robbed of the money, before he had an opportunity to pay it over, and without fault on his part, he was not liable. *Walker v British Guardian Ass'n*, 18 Q. B. 277; 21 L. J., Q. B. 257; 16 Jur. 855.

³ *Ante*, § 221.

⁴ *Supervisors v Dorr*, 25 Wend. (N. Y.) 440; affirmed, on an equal division, 7 Hill (N. Y.) 583. In support of the proposition that an officer is liable only for misfeasance or neglect, *Nelson*, Ch. J., cited, *Lane v Cotton*, 1 Ld. Raym. 646; *Whitfield v Le Despencer*, Cowp. 754; Com. Dig., tit. Action upon the case for negligence, A 2; *Bartlett v Crozier*, 15 Johns. (N. Y.) 250; *Guille v Swan*, 19 Johns. (N. Y.) 381.

was lost, the surrogate's sureties were not liable for the loss.¹ In delivering the opinion of the court, Earl, J., reviewed the decisions previously cited, and declared his dissent from the reasoning in *United States v. Prescott*,² on the ground that the changed condition of the country since 1845, when that case was decided, rendered it unnecessary to enforce such a rigid rule on the ground of public policy. In South Carolina, it has been expressly held, that a county treasurer's bond is not liable for money, lost by the failure of a bank, in good credit when the money was deposited therein.³

§ 227. **The same subject continued.**—It was held in Maine, in a case decided in 1879, that the responsibility of a county treasurer, in the absence of any statute enlarging it, is measured by the common law rule applicable to bailees for hire, other than common carriers and innholders; that the statutory official bond of a county treasurer does not increase his responsibility; but its office is to secure the performance of his legal obligations; and that if, without fault or negligence on his part, he is violently robbed of money belonging to the county, that is a valid defence, *pro tanto*, to an action on his official bond. Virgin, J., delivering the opinion of the court, said that the doctrine that a depository of public funds is an insurer, was first established in the case of *United States v. Prescott*,⁴ which case has been "followed, with more or less consistency, by numerous cases, in various jurisdictions, in which the question was directly or indirectly involved;" but that "notwithstanding the high character of the several courts whose decisions are above cited, we cannot yield our convictions as to the construction to be given to the bond in such case, or concur in

¹ *People v Faulkner*, 107 N. Y. 477, rev'g 38 Hun (N. Y.) 607.

² *York County v Watson*, 15 S. C. 1.

⁴ 3 How. U. S. 578, cited *ante*, § 222.

³ *Ante*, § 222.

relation to the new-born public policy, based upon supposed facility or temptation, which depositaries of the public money are said to possess for collusive robberies.”¹ But where a treasurer has refused to pay orders lawfully drawn on him, while he had money with which to pay them, he and his sureties are liable, although the money was subsequently destroyed by the burning of his house.²

§ 228. **The same subject continued.**—In Alabama, in a recent case (1885), where a tax collector was robbed on the highway, by being put in peril of his life, of money which he was carrying to the county seat to pay it over, it was held, that if he exercised “the highest amount of care, diligence, and vigilance” to protect the funds in his hands, and was robbed by irresistible force, which he could not have foreseen or guarded against, this was a defence to an action against him and his sureties; otherwise if it was not the same money which he received, or if he was in default for not paying it over, as if he permitted the public money to accumulate in his hands, instead of turning it over, and thus had more money with him than he should have had; and that it was for the jury to say, whether he had taken every precaution which “a very prudent and cautious man” would have taken; and so a judgment against the defendants, in an action on the officer’s official bond, was reversed, and the cause remanded.³ Upon exceptions to the rulings of the court upon the second trial in this cause, it was held, that where the tax collector took the money from the safe wherein it was deposited, at about 9 or 10 o’clock in the morning, put it in envelopes in the side pockets of his coat, and walked about a village until two o’clock in the afternoon, when he started for the

¹ *Cumberland v Pennell*, 69 Me. 357.
See also *Potter v Titcomb*, 7 Me. 302;
Bridges v Perry, 14 Vt. 282.

² *Monticello v Lowell*, 70 Me. 437.
³ *State v Houston*, 78 Ala. 576.

county seat, and on the road was robbed by a highwayman, who presented a pistol, and compelled him, by threats of death, to give up the money; he was not, as a matter of law, guilty of negligence, without proof that his conduct contributed in some way to the subsequent robbery.¹ In Louisiana, it has been said that an officer and his sureties are liable for public money, of which he has been robbed, where he might have avoided the loss, by the exercise of ordinary care and diligence.²

§ 229. **Liability where money, etc., are delivered by one officer to another.**—Where money collected by an officer is delivered, pursuant to an order of the court, to another officer, and is lost through the latter's death and insolvency, the sureties of the first officer are not liable for it.³ And if a constable, holding an execution, delivers it to another constable, who collects the money, the second constable is liable to the plaintiff in the execution, in an action for money had and received, but his sureties are not liable in any form.⁴

VI. Liability of sureties, depending upon the official or unofficial character of the act or omission, by reason of which a claim is made against them.

§ 230. **General rule and various illustrations.**—The general rule is, that sureties for a public officer are not liable for his doing or failing to do any acts, which the law does not require him to do.⁵ Thus they are not liable for a sheriff's or constable's acts or omissions in

¹ State v Houston, 83 Ala. 361.

² State v Lanier, 31 La. Ann. 423.

³ Lewis v Lee County, 66 Ala. 480.

⁴ Pettijohn v Hudson, 4 Harr. (Del.) 178.

⁵ Cotton v Atkinson, 53 Ark. 98;
Schmitt v Drouet, 42 La. Ann. 1064;
State v Norwood, 12 Md. 177;
State v Rollins, 29 Mo. 287;

State v Conover, 28 N. J. L. 224;

Gerber v Ackley, 37 Wis. 43.

See also, Coleman v Ormond, 60 Ala. 328;

Brewer v King, 63 Ala. 511;

McKee v Griffin, 66 Ala. 211;

Johnson v Foran, 58 Md. 148;

State v Davis, 88 Mo. 585;

People v Lucas, 93 N. Y. 585; and the other cases hereinafter cited.

the service of a precept or other writ, which he could not lawfully serve.¹ So the sureties of a city assessor and clerk are not liable for taxes collected by him, where there was no statute or ordinance authorizing that officer to collect taxes;² and the same rule holds respecting license fees.³ And where a village tax collector gave a bond, conditioned to collect all taxes delivered to him, and for faithful performance and paying over money; it was held that the bond was necessarily restricted to such taxes as the village authorities had power to impose; and that the sureties in the bond were not liable for state, county, and town taxes upon real property, situated within the corporate limits of the village, collected by him under a warrant, delivered to him without authority of law.⁴ And where a county collector advances to the treasury the whole amount of the taxes chargeable against him as collector, and dies before the expiration of his term, leaving part of the taxes uncollected, his successor is not bound to collect such taxes; and if he does so, he acts as an agent, and not in his official capacity. His sureties are consequently not liable for his failure to collect such taxes, and would not be liable for his failure to pay them over if he had collected them.⁵

§ 231. **Other illustrations and cases.**—So where payment of money is made to the clerk of a court, who is not authorized to receive it, the remedy is against him personally, and not on his bond, and consequently his sureties are not liable therefor.⁶ And, since it is not a part of the official duty of a collector of United States customs to carry gold to another city, to deposit it with the assistant treasurer, if he attempts to do so, under an order of the secretary of the treasury, and the gold is

¹ *Dane v Gillmore*, 51 Me. 544.

Ward v Stahl, 81 N. Y. 406.

² *San José v Welch*, 65 Cal. 358.

State v Rollins, 29 Mo. 267.

³ *Linch v Litchfield*, 16 Ill. App. 612.

⁶ *Bowers v Fleming*, 67 Ind. 541.

lost during the transit, his sureties are not liable therefor.¹ In Missouri it has been held, that the sureties of a county auditor are not responsible for the school moneys collected by him, and not accounted for, as it is not a part of the official duty of an auditor, in that state, to collect the school moneys.² But in Iowa, the county auditor is the custodian of the school fund; and it was there held, that if he delivers up, without payment, a note and a mortgage constituting part of that fund, his bond is liable, for at least nominal damages, although the county may recover against the makers of the surrendered sureties.³ The doctrine, that the sureties of an officer are not liable for money paid to him, which the statute did not require him to receive, has been affirmed in several other cases.* Especially is this the rule, where the principal received money, which by law ought to have been paid to another officer.^o

§ 232. **The same subject.**—Some questions arise, in the application of the rule to cases, where money came to the hands of an officer authorized by law to receive it, but not in the manner or under the conditions prescribed by law. Thus where a sheriff sells personal property, which he has attached, or on which he had levied under an execution; but the sale is made by agreement of the parties, and not as prescribed by law; his sureties are not liable for the money.^o So it has been held, that the sure-

¹ *United States v Adams*, 24 Fed. R. (U. S.) 348.

² *State v Bonner*, 72 Mo. 387.

³ *Madison Co. v Tullis*, 69 Iowa 720.

⁴ *Leigh v Taylor*, 7 Barn. & Cr. 491 ;
Smith v Stapler, 53 Ga. 300 ;
Saltenberry v Loucks, 8 La. Ann. 95 ;
Nolley v Callaway County Court, 11 Mo. 447 ;
People v Pennock, 60 N. Y. 421 ;

State v White, 10 Rich. L. (S. C.) 442 ;

Branch v Comm., 2 Call (Va.) 428.

See also, *United States v White*, 4 Wash. (U. S.) 414.

⁵ *Sample v Davis*, 4 Greene (Iowa) 117 ;
People v Pennock, 60 N. Y. 421 ;
Ward v Stahl, 81 N. Y. 406.

⁶ *Governor v Perrine*, 23 Ala. 807 ;
Webb v Anspach, 3 Ohio St. 522.
 So as to property replevied. *Schloss v White*, 16 Cal. 65.

ties of a constable are not liable for his failure to pay to the plaintiff, money intrusted to him for the purpose by the defendant, after the writ was served.¹ It has been held that money, paid to a sheriff or constable in satisfaction of an execution, but after the return day thereof, charges the sureties.² But other cases hold that the sureties are not charged, on the ground that the officer had no authority to receive the money.³ The sureties of a sheriff are not liable for money, paid to him by a judgment debtor, to apply upon the judgment, where no process had been issued thereupon.⁴ Nor are they liable for money, deposited with the sheriff in lieu of bail, by a defendant arrested upon a *capias*.⁵ The sureties of a deceased county treasurer are liable to a railroad company for a condemnation fund, of which he should have had charge, but which he had not taken into his possession at the time of his death.⁶ Where a county judge, pursuant to a statutory authority, has received money paid by an executor upon claims against the estate, which have been allowed, his sureties are liable for his failure to pay the same to the persons entitled thereto.⁷

§ 233. **Various rulings relating to the clerk of a court.**—The following rulings have been made, respecting the liability of the sureties for the clerk of a court, for money paid to the clerk, depending upon the question whether he received it officially or unofficially. The sureties are liable for money paid to the clerk with-

¹ *Boston v Moore*, 3 Allen (Mass.) 126.
So where the constable purchased property from the debtor, and, as part of the price, agreed to pay the judgment, *Hill v Kemble*, 9 Cala. 71.

² *Beale v Comm.* 7 Watts (Pa.) 183.

³ *Forward v Marsh*, 18 Ala. 645;
Thomas v Browder, 33 Tex. 783.

See also, *McGehee v Gewin*, 25 Ala. 176;

⁴ *State v Allen*, 7 Jones L. (N. C.) 564.

⁵ *State v Long*, 8 Ired. (N. C.) 415.
See also *State v Long*, 8 Ired. (N.C.) 513.

⁶ *Doolittle v Atchinson, etc.*, R. R. Comp'y, 20 Kan. 329.

⁷ *Wright v Harris*, 31 Iowa 272.

out process, upon a judgment entered in his office;¹ or upon a sale in partition, where the court has directed him to make the sale;² or for jail fees collected by him, pursuant to a statute, for the benefit of a city or county;³ and generally for any money which the clerk is authorized to by law to receive, although he is not authorized to distribute it.⁴ So the sureties of a prothonotary, who is authorized to receive fees due to his predecessor, are liable for fees so received.⁵ On the other hand, it has been held that a clerk's sureties are not liable for money paid into court, where there was no statute requiring him to take charge of such money, but only a custom that he should do so;⁶ nor for the money paid into court by a guardian on resigning his trust, although the court on allowing the resignation, directed the money to be so paid;⁷ nor for the fees of other officers collected by him, and not paid to them.⁸ The sureties of a clerk are liable for money paid into court, subject to the further order of the court, although he disposed of it with the consent of the administratrix of the estate, to which the money belonged.⁹

§ 234. **Liability of sureties of a notary public.**—The sureties of a notary public are not liable for money deposited with him, for the purpose of cancelling a mortgage; as it is not made by law the official duty of a notary to receive money for that purpose.¹⁰ But where the statute makes it the duty of a notary public, to give notice of non-payment or non-acceptance of a note or bill in his hands, his sureties are liable for his failure so to do.¹¹

¹ *Morgan v Long*, 29 Iowa 434;
McDonald v Atkins, 13 Nebr. 568.

² *State v Blair*, 76 N. C. 78.

³ *State v Norwood*, 12 Md. 177.

⁴ *Henry v State*, 98 Ind. 381.

⁵ *Watson v Smith*, 26 Pa. St. 395.

⁶ *Hardin v Carrico*, 3 Met. (Ky.) 289;

Carey v State, 34 Ind. 105.

⁷ *Scott v State*, 46 Ind. 203.
 See also *State v Givan*, 45 Ind. 267.

⁸ *State v Givan*, 45 Ind. 267;
Matthews v Montgomery, 25 Miss. 150.

⁹ *Sullivan v State*, 121 Ind. 342.

¹⁰ *Lescouzeve v Ducatel*, 18 La. Ann. 470.

¹¹ *Wheeler v State*, 9 Heisk (Tenn.) 393.

§ 235. **Justice of the peace or constable, as to collections, etc.**—The following rulings have been made, respecting the liability of the sureties of officers connected with the administration of justice, to the person intrusting them with securities for collection. The sureties in the bond of a justice of the peace are liable for his conversion of notes or other securities left with him for collection;¹ but not for money paid upon such a demand before it was due,² or where he received the demand for collection as the creditor's agent.³ They are liable, however, for money collected in his official character, although without suit;⁴ or paid to him, without execution, upon a judgment recovered before him;⁵ even although the judgment was for a sum exceeding his jurisdiction.⁶ They are not liable for money received by him, as security for the appearance of a prisoner before him on a criminal charge, and converted by him, where the statute contains no provision allowing him to receive money in such a case.⁷ A constable's sureties are not liable for his default, with respect to the collection of a demand, left with him for that purpose.⁸ But in North Carolina, it has been held, that a constable's sureties are liable for his failure, through his default, to collect a note or other security placed in his hands.⁹ And in Tennessee, it has been held, that where a constable obtains, without suit, the money upon a demand placed in his hands for collection, his

¹ *Latham v Brown*, 16 Iowa 118;
Bessinger v Dickerson, 20 Iowa 260.
 See also *Peabody v State*, 4 Ohio St. 387.

² *Stevens v Breatheven*, *Wright* (Ohio) 733.

³ *Comm. v Kendig*, 2 Pa. St. 448.

⁴ *Ditmars v Comm.*, 47 Pa. St. 335.
 See also *Widener v State*, 45 Ind. 244.

⁵ *Brockett v Martin*, 11 Kan. 378.

⁶ *Hale v Comm.*, 8 Pa. St. 415.

⁷ *Cressey v Gierman*, 7 Minn. 398.

⁸ *Bogart v Green*, 8 Mo. 115;
Treasurers v Temple, 2 Spears (S.C.) 48;
Crittenden v Terrill, 2 Head (Tenn.) 588.

⁹ *State v Stephens*, 3 Ired. L. (N. C.) 92;
State v Walker, 3 Ired. L. (N. C.) 95;
State v Eskridge, 5 Ired. (N. C.) 411;
State v Johnson, 7 Ired. L. (N. C.) 77;
State v Wall, 8 Ired. L. (N. C.) 11.
 See also *State v Smith*, 2 Jones L. (N. C.) 4.

sureties are liable therefor,¹ although a sheriff's sureties are not liable for his default, with respect to the collection of such a demand.² In one case it was held, that where a constable collects, without suit, a demand which exceeds the jurisdiction of any of the inferior courts, the act is not official, and his sureties are not liable.³

§ 236. **Liability where bond did not cover particular official capacity; two offices and one officer.**—The sureties of an officer are not liable for money received by him, although in an official capacity, where it was not received in the particular official capacity for which the bond provides. Thus the sureties in a chancery clerk's bond are not liable for money, received by him from the sale of the assets of a decedent's estate, made by him as special commissioner appointed by the court.⁴ So, where the clerk of the court is appointed receiver in a suit pending therein, his sureties are not liable for his conduct as receiver.⁵ Nor are the surveyor-general's sureties liable for his acts as register;⁶ nor those of the register in chancery for his acts as probate judge,⁷ nor those of the sheriff for the proceeds of lands sold by the sheriff, under a trust which named him, as sheriff, to be substituted trustee, if those first named should decline to act.⁸ So where the sheriff is *ex officio* tax collector, but the offices are not merged, and separate bonds are given for each; the sureties in the bond as collector are not liable for his acts as sheriff, and are not entitled to the short limitation of actions upon sheriffs' bonds.⁹ But

¹ *Bosley v Smith*, 3 Humph. (Tenn.) 406;

Rader v Davis, 5 Lea (Tenn.) 536.

Contra, *United States v Cranston*, 3 Cranch C. C. (U. S.) 289.

² *Haynes v Bridge*, 1 Coldw. (Tenn.) 32.

³ *Comm. v Sommers*, 3 Bush (Ky.) 555.

⁴ *Alcorn v State*, 57 Miss. 273.

⁵ *Kerr v Brandon*, 84 N. C. 128;

State v Odom, 86 N. C. 432;

Syme v Bunting, 91 N. C. 48;

Waters v Carroll, 9 Yerg. (Tenn.) 102.

⁶ *People v Gardner*, 55 Cala. 304.

⁷ *McKee v Griffin*, 66 Ala. 211.

⁸ *State v Davis*, 88 Mo. 585.

⁹ *People v Burkhart*, 76 Cala. 606.

where the sheriff, acting as special master-commissioner, sold mortgaged premises, and a balance was left in his hands, which the court directed him to invest on interest, to await its determination as to the person entitled to the money; it was held that the sheriff's sureties were liable for the money when in his hands; that the order to invest it did not change the character in which he held it; and that they were consequently liable to the rightful claimant, as adjudged by the court, for his failure to pay it over, although it was not demanded till after the expiration of the sheriff's term.¹ And, generally, where two offices are so far united, that the person holding one, *ex officio* holds the other, and but one bond is given by him, the sureties in that bond are liable for his acts and omissions in discharging the duties of either, although the office, with respect to which the default occurred, is not named in the bond.² And where a town board, consisting of three commissioners, appointed one of its members treasurer of the board, who appropriated to his own use license fees payable to the town; it was held that the sureties in his bond as commissioner were liable for the defalcation.³

§ 237. **Bonds of a justice of the peace; the acts they cover, and liability of sureties; cases.**—Of the same general character are the rulings, respecting the official bonds of justices of the peace, which, although in terms general, as for faithful performance, are limited by the dual character of the duties of the office, which are partly ministerial and partly judicial. The sureties in a justice's bond are liable only for ministerial acts, not for errors, omissions, or mistakes in his judicial acts.⁴ But it has been said that

¹ Hubbard v Elden, 43 Ohio St. 380.

State v Thomas, 88 Tenn. 491.

² Redwood v Grimmerstein, 68 Cal. 512;

³ State v Wright, 50 Conn. 580.

People v Stewart, 6 Ill. App. 62;

Satterfield v People, 104 Ill. 448;

Van Valkenburgh v Patterson, 47 N. J. L. 146.

See, however, Jarnagin v Atkinson, 4 Humph. (Tenn.) 470;

⁴ McGrew v Governor, 19 Ala. 89;

Gowing v Gowgill, 12 Iowa 495;

Place v Taylor, 22 Ohio St. 317.

See also, Hamilton v Williams, 26 Ala. 527.

where he acts through favor, fraud, or partiality, or knowingly commits a wrong in virtue of his office, although it was done in the performance of a judicial act, his sureties are liable; as where he heard a cause three hours before the time set for the hearing, and through favor and with intent to defraud.¹ It has been also held, that where a probate judge makes an illegal order, upon the final report of an administrator, his sureties are liable.² And that the sureties of a justice of the peace are liable, even after his death; for his failure to file appeal papers, as his duty required him to do, since it was a breach of his bond for faithful performance, although a tort must be proved to establish it.³

VII. Rulings relating to the liability of the sureties for acts of malfeasance, or wrongs committed by the officer colore officii.

§ 238. **Contradictory rulings on general proposition.**—Upon this question, there is much diversity of opinion in the adjudications. The general proposition that the sureties are not liable for wrongful acts, done *colore officii*, has been stated in some cases;⁴ and in others, it has been said that they are liable for such acts.⁵ It has been said, in Kentucky, that they are liable for tortious acts *colore officii*, but not for acts of violence, which are personal

¹ *Gowing v Gowgill*, 12 Iowa 495.
See also *State v Flinn*, 3 Blackf. (Ind.) 72;
State v Littlefield, 4 Blackf. (Ind.) 129;
Howe v Mason, 12 Iowa, 202;
Fox v Meacham, 6 Nebr. 530.

² *Smith v Lovell*, 2 Monta. 332.

³ *State v Houston*, 4 Blackf. (Ind.) 291.

⁴ *Lowell v Parker*, 10 Met. (Mass.) 309;
Rollins v State, 13 Mo. 437;
State v McDonough, 9 Mo. App. 63;

Huffman v Koppelkom, 8 Nebr. 344;
State v Nichol, 8 Lea (Tenn.) 657;
State v Mann, 21 Wis. 684;
Gerber v Ackley, 32 Wis. 233;
Gerber v Ackley, 37 Wis. 43.

⁵ *State v Druly*, 3 Ind. 431;
Charles v Haskins, 11 Iowa 329;
Comm. v Cole, 7 B. Mon. (Ky.) 250;
State v Moore, 19 Mo. 369;
State v Farmer, 21 Mo. 160;
State v Shacklett, 37 Mo. 280;
Mosby v Mosby, 9 Gratt. (Va.) 584.

wrongs.' And in the same state, it was held, that the sureties of a tax collector are not liable for trespasses, such as the acts of the collector in collecting the taxes without an order of the court.* The sureties of a justice of the peace are not liable for his wrongful act, in committing a person for contempt without authority of law.†

§ 239. **Rulings in various cases upon the same subject.**—Where a constable attached goods under a writ, in which the *ad damnum* exceeded \$70, and which he therefore had no authority to serve, it was held that his sureties were liable, because he took the goods *colore officii*, and this was a breach of his official duty.* Where a county clerk, during the term, improperly made out a certificate of a matter of record, and after the expiration of the term, presented the certificate to the county board, and procured an allowance thereupon, to which he was not entitled, it was held that his sureties were not liable.† But an officer's sureties are liable for an excessive amount of salary drawn by him without lawful authority.‡ Where a sheriff, who had levied an attachment upon sufficient property, falsely represented to the plaintiff that no property could be found, and thereby induced the plaintiff to sell him the demand for a fraction of its value, it was held that his sureties were not liable.‡

§ 240. **The weight of authority upon the question ; instances.**—The preponderance of the American authorities supports the doctrine, that the sureties of a sheriff, constable, or other officer having similar powers, are liable for an unauthorized levy upon or sale of property, under pro-

¹ Jewell v Mills, 3 Bush (Ky.) 62.

(Mass.) 427.

² Greenwell v Comm., 78 Ky. 320.

³ People v Toomey, 25 Ill. App. 46; 122 Ill. 308.

³ Doepfner v State, 36 Ind. 111.

⁴ Lowell v Parker, 10 Met. (Mass.) 309.
See also Knowlton v Bartlett, 1 Pick. (Mass.) 271 ;

⁵ People v Treadway, 17 Mich. 480.

See also Mahaska County v Ruan, 45 Iowa 328.

Williamstown v Willis, 15 Gray

⁷ Governor v Hancock, 2 Ala. 728.

cess in his hands; although the cases do not agree upon this question. In New York, it has been held, that where a sheriff, having in hands process against A, seizes, under color thereof, goods belonging to B, this is an act of official misconduct, and a breach of his bond, "for the faithful performance of the duties of his office," for which his sureties are liable.¹ The contrary rule was established in a more recent case, where the action was against the sureties of a constable; but the decision turned upon the peculiar language of the constable's bond, which was only conditioned to pay to the persons entitled, all sums which he "may become liable to pay on account of any execution delivered to him for collection." The court said that a neglect to return the execution, or to levy under it, or to pay over money collected, or the like, was a liability within the fair meaning of the bond; but that "where the constable commits a bare trespass upon the property of a third person, not a party to the execution, although under color of the process, the liability he incurs to the person injured, is in no just sense on account of the execution. The act done is neither commanded nor justified by the writ. . . . The execution is a mere circumstance attending the conversion. The liability of the constable is not founded upon the execution, but upon the trespass of which it was the occasion and incident."²

§ 241. **Authorities upon either side of the question.**—The doctrine, that the sureties in a bond for faithful performance are liable for a levy upon, or sale of A's property, under process against B, or other similar wrongful act, has been stated and applied in a preponderating

¹ *People v Schuyler*, 4 N. Y. 173, rev'g 5 Barb. (N. Y.) 166, and overruling *Ex parte Reed*, 4 Hill (N. Y.) 572. See also *Ex parte Chester*, 5 Hill (N. Y.) 555; *Cumming v Brown*, 43 N. Y. 514.

² *People v Lucas*, 93 N. Y. 585, rev'g 25 Hun (N. Y.) 610; approving *Sloan v Case*, 10 Wend. (N. Y.) 371; and distinguishing *People v Schuyler*, 4 N. Y. 173.

number of cases.¹ But, in a few others, the contrary doctrine has prevailed, and the sureties have been exonerated from liability for such a levy or sale.²

VIII. Various other rulings, relating to the liability of the sureties in particular cases.

§ 242. **Liability for negligence, etc.; instances.**—It will be more convenient to group together in one division, some miscellaneous rulings upon the question, whether the condition of an official bond is forfeited in particular cases, before proceeding to the consideration of questions arising upon affirmative defences of the sureties, in cases clearly within the condition of the bond. Where the clerk of a court, on entering judgment, omitted to insert the sum recovered, whereby a levy was defeated, it was held that he and his sureties were liable therefor to the judgment creditor.³ A sheriff's sureties are liable to the judgment creditor for the sale by the sheriff of exempt

¹ Van Pelt v Littler, 14 Cala. 194;
United States v Hine, 3 MacArthur,
(D. C.) 27;
Jefferson v Hartley, 9 S. E. (Ga.) 174;
Horan v People, 10 Ill. App. 21;
Jones v People, 19 Ill. App. 300;
State v Druly, 3 Ind. 431;
Strunk v Ocheltree, 11 Iowa 158;
Charles v Haskins, 11 Iowa 329;
Forsythe v Ellis, 4 J. J. Marsh. (Ky.) 298;
Comm. v Stockton, 5 T. B. Mon. (Ky.)
192;
Jewell v Mills, 3 Bush (Ky.) 62;
Archer v Noble, 3 Me. 418;
Harris v Hanson, 11 Me. 241;
Greenfield v Wilson, 13 Gray (Mass.)
384;
Tracy v Goodwin, 5 Allen (Mass.) 409;
Turner v Sisson, 137 Mass. 191;
People v Mersereau, 42 N. W. (Mich.)
153;
State v Moore, 19 Mo. 369;
Noble v Himeo, 12 Nebr. 193;

Turner v Killian, 12 Nebr. 580;
Mayor, etc., v Ryan, 7 Daly (N.Y.) 436;
State v Jennings, 4 Ohio St. 418;
Hubbard v Elden, 43 Ohio St. 380;
Brunott v McKee, 6 Watts & S (Pa.) 513;
Carmack v Comm., 5 Binn. (Pa.) 184;
Holliman v Carroll, 27 Tex. 23;
Sangster v Comm., 17 Gratt. (Va.) 124;
Lammon v Feusier, 111 U. S. 17.
See also, Walsh v People, 6 Ill. App. 204;
Heidenheimer v Brent, 59 Tex. 533;
Gerber v Ackley, 32 Wis. 233;
Gerber v Ackley, 37 Wis. 43.

² State v Brown, 54 Md. 318;
State v Conover, 28 N. J. L. 224;
State v Brown, 11 Ired. L. (N. C.) 141;
See also, McElhaney v Gilleland, 30
Ala. 183;
McKee v Griffin, 66 Ala. 211;
Jenkins v Lemonds, 29 Ind. 294;
Carey v State, 34 Ind. 105;
Brown v Moseley, 19 Miss. 354.

³ Governor v Dodd, 81 Ill. 162.

property, after notice of the exemption.¹ So, also, the sureties of a sheriff are liable to the judgment creditor, for his release of a valid levy; and it is no defence that the property was claimed by a third person, and that the sheriff demanded an indemnity from the judgment creditor, which he promised but failed to furnish.² And the sureties of a constable, or other officer exercising similar powers, are liable for the acts of a deputy illegally appointed.³ The sureties of a constable are liable where property, seized by virtue of a lawful writ, is damaged in his hands, by reason of his negligence.⁴ So, also, the sureties of a sheriff are liable for not paying a landlord his rent, from the proceeds of the sale of the tenant's goods, liable to distress, after notice that the rent is in arrear.⁵ But where the statute provided that a guardian should not act without a bond, and the clerk issued to him a certificate of guardianship without a bond; it was held that the clerk's sureties were not liable for the wasting of the estate, because it was not a part of his official duty to give such a certificate, and the guardian had no power to act without giving a bond.⁶ Payment by a treasurer of an illegal warrant, after a legal warrant has been substituted therefor, out of the fund set apart for the payment of the substituted warrant, is a breach of the treasurer's bond, for which his sureties are liable.⁷

§ 243. **Honest mistakes and want of skill.**—An official bond, whatever special conditions it may contain, almost invariably contains a general condition that the officer shall faithfully discharge the duties of his office. This

¹ *Casper v People*, 6 Ill. App. 28.
See also, cases cited in note ¹, p. 257.

² *State v Rayburn*, 22 Mo. App. 303.

³ *State v Muir*, 20 Mo. 303.

⁴ *Witkowski v Hern*, 82 Cal. 604.

⁵ *Governor v Edwards*, 4 Bibb (Ky.) 219.

See also *State v Wailes*, 3 Harr. & M. (Md.) 241;

Governor v Jones, 2 Hawks (N. C.) 59;
McKee v Love, 2 Overt. (Tenn.) 243;
Crawford v Jarrett, 2 Leigh (Va.) 630.

⁶ *State v Sloane*, 20 Ohio 327.

⁷ *Priet v De La Montanya*, 85 Cal. 148.

condition is not broken by an honest error of judgment, or an honest mistake, or want of skill in the discharge of a duty, where the precise mode of discharging it is not pointed out by the statute.¹ But the mere fact that the officer acted in accordance with the opinion of the attorney general will not suffice to protect him or his sureties.²

§ 244. **Correct accounts and reports; faithful disbursement.**—The condition for faithful performance is broken by the officer's failure to keep his accounts, or make his reports, as required by statute.³ In a recent case in New York, the court said: "The undertaking of sureties in a treasurer's official bond is that he shall faithfully perform his duties; and this involves the obligation of making correct reports, conforming to the requirements of the statute, as well as the payment of funds in his custody. In an action against sureties for an alleged breach of such a bond, the official reports made during the term covered by them, are a part of the *res gestae*, and competent evidence, not only of the facts affirmatively appearing therein, but also of such other facts and circumstances, bearing upon the liability of the sureties, as are legitimately inferable therefrom. This arises, not alone from the principle authorizing the reception of such evidence or declarations of the principal, but as being an official act, performed under the directions of the statute, in pursuance of the stipulations contained in the bond, whereby the sureties have assumed the liability of any neglect in the discharge of the duty."⁴ That such a condition covers the faithful disbursement of the moneys, coming into the officer's hands, goes without saying; but

¹ *Alexandria v Corse*, 2 Cranch C. C. (U. S.) 363.

See also, *State v Chadwick*, 10 Oreg. 465.

² *Dodd v State*, 18 Ind. 56.

³ *Poweshiek County v Ross*, 9 Iowa, 511.

See, however, *Bocard v State*, 79 Ind. 270;

State v Mayes, 54 Miss. 417.

⁴ *Supervisors v Bristol*, 99 N. Y. 316, per Ruger, Ch. J., pp. 321, 322.

a doubt has been suggested in one case, whether it has that effect, where the statute expressly requires a condition for faithful disbursement, in addition to the general condition for faithful performance, and the former condition has been omitted from the bond.¹

§ 245. **The effect of such accounts and reports.**—To what extent the officer's accounts and reports, especially where they have been settled by competent authority, are conclusive against the sureties, is left open to doubt by the adjudications. The better opinion appears to be, that such accounts and reports are only *prima facie* evidence against the sureties;² although in some cases it has been held that they are conclusive.³ And the effect is the same, where the settlement was made between the proper auditing officers and the administrator of a deceased principal.⁴ But where the county court had allowed a collector's account, in which he had credited himself with excessive commissions, it was held that the court might, within two years thereafter, open and restate the account.⁵

§ 246. **Omission of county treasurer to foreclose mortgage.**—Where a county treasurer received from his predecessor a bond and mortgage for \$5,000, for the benefit of certain infants, the interest upon which was nearly

¹ *Farrar v United States*, 5 Pet. (U. S.) 373, cited *ante*, § 192.

² *Kilpatrick v Pickens Co.*, 66 Ala. 422; *Lowry v State*, 64 Ind. 421, overruling former cases; *Boone Co. v Jones*, 54 Iowa 699; *Hatch v Attleborough*, 97 Mass. 533; *Rochester v Randall*, 105 Mass. 295; *Williamsburgh Ins. Comp'y v Frothingham*, 122 Mass. 391; *Bissell v Saxton*, 66 N. Y. 55; *Sup'rs v Bristol*, 99 N. Y. 316; *United States v Eckford*, 1 How. (U. S.) 250; *United States v Boyd*, 5 How. (U. S.) 29.

See also *ante*, §§ 208, 217, and *post*, §§ 282, 283.

³ *State v Wood*, 51 Ark. 205; *Morley v Metamora*, 78 Ill. 394; *Roper v Sangamon Lodge*, 91 Ill. 518; *Chicago v Gage*, 95 Ill. 593; *Longan v Taylor*, 130 Ill. 412; *Baker v Preston*, 1 Gilm. (Va.) 235, questioned, and, *semble*, overruled, in subsequent cases. See *Crawford v Turk*, 24 Gratt. (Va.) 176.

⁴ *Wycough v State*, 50 Ark. 102.

⁵ *Wilson v State*, 51 Ark. 212.

See further, as to opening a settled account, *post*, §§ 282, 283.

two years in arrear; and the property covered by the mortgage had greatly depreciated in value, and the mortgagor was insolvent; but the treasurer did not commence proceedings to foreclose the mortgage until a year after he received the same; and upon the foreclosure sale the property brought much less than the amount due upon the mortgage; it was held that a complaint, setting forth those facts, was bad on demurrer, because it did not expressly charge negligence or notice, or show that the defendant was chargeable with neglect of duty.¹

§ 247. **Acts or omissions out of officer's district.**—Where a constable is elected for a particular district, and gives bond accordingly, the sureties are not liable for his failure to collect an execution, out of property in another district of the same county, although he had authority to act in the latter, inasmuch as his bond covers only the particular district.² Where a second parish is formed in a town which had not been organized as a parish, and the town continues to manage the affairs of the first parish, the sureties of the collector are liable for money received by him, on a tax assessed to pay the minister of the first parish.³ Money received by a sheriff, for keeping and guarding prisoners in a county other than his county, is received by him officially; and his sureties are liable therefor to the persons rendering the services.⁴

§ 248. **Liability of sureties of officer having charge of records of deeds, etc.**—The sureties of a register of deeds, county clerk, prothonotary, or other officer having charge of public records, are liable to the person injured, for a false statement in a certificate given by the officer, upon the requisition of such person, respecting the exist-

¹ Woolley v Baldwin, 101 N. Y. 688.

³ Ashby v Wellington, 8 Pick. (Mass.) 524.

² Governor v Morris, 3 Murph. (N. C.) 146.

⁴ Martin v Seeley, 15 Nebr. 136.

ence or nonexistence of records of conveyances, judgments; or other liens, affecting property which is the subject of inquiry; or the contents of such records.¹ And it seems to be immaterial, whether there is any proof of payment of the officer's fees.² So where the clerk is required by statute to note in the margin of the record of a mortgage, the payment and cancellation of the mortgage, if he falsely makes such a note, his sureties are liable to a purchaser for the amount necessarily paid to relieve the property from the incumbrance.³ But one who fails to make the proper inquiries, from the clerk or the vendor, cannot recover.⁴

§ 249. **Liability of sureties of clerk of a court.**—So, if the clerk of a court having jurisdiction neglects to give notice to a guardian to renew his bond, as the statute requires the clerk to do, he and his sureties are liable to the ward for any loss incurred by the insufficiency of the bond.⁵ They are liable also for losses sustained through the failure of the clerk to require proper sureties in a guardian's bond.⁶ But the sureties of the clerk are not liable for his taking an insufficient bond on appeal, for it is the duty of the court to see that the bond is sufficient.⁷ But they are liable, where he takes the bond of the defendant, with his wife as the only surety, upon the dissolution of a garnishment; and the amount of their liability is the sum which might have been recovered from the garnishee, except for such dissolution.⁸ In Illinois, it was held that they were not liable, where the

¹ Fox v Thibault, 33 La. Ann. 32;
Smith v Holmes, 54 Mich. 104;
McCaraher v Comm., 5 Watts & S.
(Pa.) 21;
Ziegler v Comm., 12 Pa. St. 227.
But he is liable for such negligence
only to the person for whom the
search was made. Day v Reynolds,
23 Hun (N. Y.) 131; Savings Bank v
Ward, 100 U. S. 195.

² Ziegler v Comm., 12 Pa. St. 227.

³ Appleby v State, 45 N. J. L. 161.

⁴ Crews v Taylor, 56 Tex. 461.

⁵ State v Watson, 7 Ired., L. (N. C.) 289;

⁶ State v Windley, 99 N. C. 4;

⁷ McAllister v Serice, 7 Yerg. (Tenn.) 277;

⁸ Spain v Clemens, 63 Ga. 786.

clerk transmitted to the appellate court, upon an appeal, a bond, in which the name of one of the appellants was omitted, because, in that state, the statute requires him only to approve the sufficiency of the sureties in an appellate bond, and otherwise he has no duty to perform, with respect to the sufficiency of the bond.¹ They are liable for his failure to enter a cause on the docket;² or where he has negligently allowed one of two judgment creditors to secure a preference to which he was not entitled.³ And they are liable for the clerk's failure to enroll a judgment, but not necessarily to the full amount of the judgment; that depends upon the sufficiency of the property upon which it would have been a lien, if properly enrolled, and which was swept away by the junior judgment.⁴ They are liable to the county, where the clerk lent his official seal and signature to a witness's certificate which was false;⁵ or where he has failed to index and enroll the judgments recovered, and has charged and received the fees for so doing.⁶ But non-payment of money is not a breach of the condition of a clerk's bond, unless after an order to pay it, and a demand of payment.⁷ It is not a defence to an action on the bond, that the plaintiff agreed with the clerk, that he might keep for a time money paid into court, to which the plaintiff was entitled, and pay the plaintiff interest upon it.⁸ The clerk's omission to issue an execution upon a judgment is not a breach of the condition of his bond, unless the judgment creditor has applied to the clerk so to do.⁹

¹ *People v Leaton*, 121 Ill. 666;

² *Brown v Lester*, 21 Miss. 392

³ *Newbern Bank v Jones*, 2 Dev. Eq. (N. C.) 284;

⁴ *Strain v Babb*, 30 S. C. 342.

⁵ *Lewis v State*, 65 Miss. 468;

⁶ *Chester v Hemphill*, 29 S. C. 584;

⁷ *State v Lake*, 30 S. C. 43;

⁸ *Sullivan v State*, 121 Ind. 342, at p. 347;

⁹ *Badham v Jones*, 64 N. C. 655.

For additional rulings, respecting the liability of a clerk and his sureties for official negligence, see *Collins v McDaniel*, 66 Ga. 203; *Billings v Lafferty*, 31 Ill. 318;

§ 250. **Liability of sureties of officer issuing marriage license.**—Several rulings have made, in the states where a license is required for a marriage, respecting the liability of the sureties in the bond of an officer authorized to grant such a license. It has been held, that a father cannot maintain an action upon the official bond of a register of deeds, for a breach of duty in issuing a marriage license to his daughter, who was under eighteen years of age, without the father's consent; because the condition of the bond covers only the performance of the duties recited in the bond, that is, the safekeeping, etc., of the records.¹ The same ruling was made respecting the sureties in the bond of a circuit clerk, but it was put upon the ground that as the marriage was lawful, and the husband had succeeded to the father's right to the girl's services, the issuing of the license was *damnum absque injuria*.² But it was held, in Alabama, that the sureties of a judge of probate were liable in an action *qui tam*, brought by a father for illegally issuing a marriage license to his minor son, under a statute imposing a penalty for so doing, although the license was issued by an authorized clerk.³

§ 251. **Apparent deficiencies, and cases of same general character.**—Where there is only an apparent deficiency in an officer's accounts, that is, where the balance against him is merely a matter of bookkeeping, caused

Hubbard v Switzer, 47 Iowa 681;

Haverley v McClelland, 57 Iowa 182;

Anderson v Johett, 14 La. Ann. 624;

Maxwell v Pike, 2 Me. 8;

Smith v Holmes, 54 Mich. 104;

McNutt v Livingston, 15 Miss. 641;

Brown v Lester, 21 Miss. 392;

Rosenthal v Davenport, 38 Minn. 543;

Brock v Hopkins, 5 Nebr. 231;

Lum v McCarty, 39 N. J. L. 237;

Boyden v Burke, 14 How. (U. S.) 575;

Lyman v Windsor, 24 Vt. 575;

Lyman v Edgerton, 29 Vt. 305.

¹ Moretz v Ray, 75 N. C. 170;

Holt v McLean, 75 N. C. 347.

See also Brooks v Governor, 17 Ala. 806.

² Holland v Beard, 59 Miss. 161, overruling dictum in State v Baker, 47 Miss. 88.³ Wood v Farnell, 50 Ala. 546.

by his failure to keep separately the payments and receipts belonging to different funds, but there is really no defalcation; his sureties are not liable, although their bond applies only to the particular account which is apparently short.¹ A tax collector's sureties are not liable because he keeps money collected for a dissolved municipal corporation, until some one appears, who has a right to demand and receive it.² Where a constable defended an action to protect his levy, the plaintiff in the execution having had notice of his so doing, and, having succeeded, paid his attorney from the proceeds of the levy, and retained the sum so paid, it was held that this was not a breach of his bond.³ In one case it was held, that the use of township money, by a township trustee in his own business, was not *per se* a conversion and a breach of his official bond.⁴ But in other cases, it has been held, that if a township trustee is required by law to keep two or more funds distinct, it is a breach of his bond to apply money belonging to one fund to pay a claim against another.⁵ As against his sureties, the condition of a financial officer's bond is broken, if he dies with funds in his hands unaccounted for.⁶

§ 252. **Miscellaneous cases as to liability of sureties of sheriff, constable, etc.**—The condition of a sheriff's, constable's, or marshal's bond is broken by the exaction of illegal fees;⁷ or by his refusal to lay off exempt property upon making a levy.⁸ His exaction from the judgment debtor of more than can be lawfully required upon the writs in his hands, even although he does not levy,

¹ *United States v Morgan*, 28 Fed. Rep. U. S.) 48.

² *Dodge v People*, 113 Ill. 491.

³ *Johnson v Haynes*, 37 Hun 303.

⁴ *Brown v State*, 78 Ind. 239.

See also *Bocard v State*, 79 Ind. 270.

⁵ *Robinson v State*, 60 Ind. 26;
Oconto County v Hall, 47 Wis. 208.
See also *ante*, § 220.

⁶ *Allen v State*, 6 Blackf. (Ind.) 252.

⁷ *Kane v Union P. R. R. Comp'y*, 5 Neb. 105.

⁸ *State v Kenan*, 94 N. C. 296.

is also a breach of his bond.¹ Where a sheriff collected money under an execution, regular upon its face, and the judgment was reversed after his death; it was held that his sureties were not liable for the sheriff's commissions, to the defendant in the execution, although it was conceded that they would have been liable, if the judgment had been reversed in the sheriff's lifetime.² But the sureties of a sheriff are liable for the value of attached property, not returned to the owner, after judgment in the latter's favor.³ They are liable also for a false return.⁴ It was held, in one case, that a tender to the creditor by a sheriff, of money collected by him upon execution, and the creditor's refusal to receive it, do not discharge the sureties in the sheriff's official bond, and they are liable, if the sheriff afterwards fails to pay the money. Read, J., delivering the opinion of the court, said: "The condition of a sheriff's bond is for the faithful discharge of duties. It is urged by counsel that if tender and refusal will not relieve his sureties, it is the application of a harder rule than exists in ordinary suretyships. The principle of discharge, arising from an act done by the creditor, prejudicial to the surety, does not apply. An ordinary suretyship is a mere contingent obligation for the payment of money, in default of the principal. The sureties upon an official bond guaranty the faithful performance of official duty. The payment of money, and other acts done by the creditor, injurious to the surety, may discharge the one; but the faithful and honest performance of official duty alone can fulfil the condition of the other. The fact of tender and refusal does not convert the official trust, into a mere private liability for a money demand. The obligation to

¹ *Treasurers v Buckner*, 2 McMull. (S. C.)

327.

Accord, *Snell v State*, 43 Ind. 359.

² *Clark v Lamb*, 76 Ala. 406.

³ *Dennie v Smith*, 129 Mass. 143.

⁴ *Ex parte Chester*, 5 Hill (N. Y.) 553.

pay over money, received by a sheriff in his official capacity, continues an official duty, until performed by payment to the party entitled. As long, then, as the obligation to pay continues an official duty, so long were the sureties responsible for its violation, upon their bond.”¹ But, in another case, it was held that where a constable, who had collected money, tendered it to the creditor, who said to him that he might keep it for some weeks or months, and he did so, the sureties were discharged.²

§ 253. **Depreciation of current bank notes; tax collector; grain inspector.**—It has been held, in Tennessee, that a county officer and his sureties are not liable for the depreciation in his hands of bank bills, taken when they were current as money, and in good faith.³ The sureties of a tax collector are liable for the taxes which he might have collected with due diligence, but which were lost by his remissness; although the uncollected taxes have been delivered to his successor for collection.⁴ If the tax collector of a village pays over less than his warrant calls for, and renders no account or return of the unpaid taxes, his sureties are liable for the deficiency, since, without the return, proceedings cannot be taken by the village collect the unpaid taxes.⁵ Where it is the duty of the chief inspector of grain, as fixed by the board of railroad and warehouse commissioners, to pay over to his successor the residue of the inspection fees which he has collected, the sureties in his official bond are liable for his default in paying over the same; and they cannot be heard to say that the surplus is larger than it ought to be.⁶

¹ *State v Alden*, 12 Ohio 59.

² *Wells v Gant*, 4 Yerg. (Tenn.) 491.

³ *Peck v James*, 3 Head (Tenn.) 75.

⁴ *State v Lott*, 69 Ala. 147;

Colerain v Bell, 9 Met. (Mass.) 490;

State v Rollins, 29 Mo. 267;

Pittsburg v Tabor, 61 N. H. 100.

⁵ *Olean v King*, 116 N. Y. 355.

⁶ *People v Harper*, 91 Ill. 357.

§ 254. **Town commissioners' sureties liable for improper issue of bonds of town.**—Where commissioners were appointed for a town, under an act of the legislature authorizing them, with the consent of the town, to issue the bonds of the town, to take stock in a railroad company; and they issued the bonds without such consent; it was held that this was a breach of their official bond, and that a subsequent statute, ratifying and confirming their act in so doing, was unconstitutional.¹

§ 255. **Liability of sureties for profits made by officer from funds in his hands.**—It was held, in New York, that a county treasurer's sureties are liable for money, which the treasurer received as interest on the deposit of the money in his hands. In so holding, the court said: "The notion that a public officer may keep back interest, which he has received upon a deposit of public moneys, as a perquisite of office, is an affront to law and morals; for, if done with evil intent, it is nothing less than embezzlement."² But, in Georgia, where the statute prohibits the state treasurer from using the funds of the state in his hands, or allowing others so to do, under a penalty, it was held that an action would not lie upon the treasurer's official bond for money received by him for the use of the funds in his hands; since, inasmuch as the act was prohibited under a penalty, the money could not be said to have come to his hands, by virtue of his office.³ In Illinois, it has been held, that a sheriff, receiving commissions from a bank for the deposit of the taxes collected by him, cannot retain the money to his own use, but must account therefor as part of the taxes received by him.⁴ So the sureties of a county treasurer are liable for his appropriation to himself of the interest,

¹ *Hardenbergh v Van Keuren*, 16 Hun (N. Y.) 17, rev'g 4 Abb. N. C. (N. Y.) 43.

² *Supervisors v Wandel*, 6 Lans. (N. Y.) 33.

³ *Renfroe v Colquitt*, 74 Ga. 618.

⁴ *Hughes v People*, 82 Ill. 78.

received on bonds procured through the sale, or on notes given for the purchase money, of the four leagues of land, granted to the county for school purposes.¹

§ 256. **Sureties to officer de facto not liable to officer de jure for emoluments.**—Where an officer *de jure* recovers the office from the officer *de facto*, the sureties on the latter's bond are not liable to the former, although their principal is so liable, for the emoluments received by the latter, during his wrongful occupancy of the office.²

§ 257. **Liability to printers for advertising; sureties of mail contractor.**—The sureties of a sheriff or other officer are not liable to the printers, for their fees in advertising notices of sales and other official notices, although he is required by law to make such advertisements, and they would have been liable if he had failed so to do.³ Nor are they liable to the printers, where the sheriff has collected upon an execution their bill for advertising, and has failed to pay them.⁴ The sureties in a mail contractor's bond are liable only to the United States, for his failure to fulfil his contract; and a private person cannot recover against them damages for the contractor's failure to transport a mail package.⁵

§ 258. **Sureties not liable for statutory penalty.**—The authorities agree, that the sureties in an official bond are, not liable for a penalty imposed by statute upon the officer for his official neglect or misconduct.⁶

¹ *Simons v Jackson*, 63 Tex. 428.

It has been held, that the receipt of interest by a custodian of public money, from a bank of deposit, is not an offence at common law. *In re Breene*, 14 Colo. 401.

² *Curry v Wright*, 86 Tenn. 636.

³ *Brown v Phipps*, 14 Miss. 51;

Comm. v Swope, 45 Pa. St. 535.

⁴ *Allen v Ramey*, 4 Strobb. (S. C.) 30.

⁵ *McRea v McWilliams*, 58 Tex. 328.

⁶ *Brooks v Governor*, 17 Ala. 806;
Caspar v People, 6 Ill. App. 28;
Tappan v People, 67 Ill. 339;
State v Baker, 47 Miss. 88;

IX. Liability of the sureties, where the bond was executed upon a condition, which has not been fulfilled.

§ 259. **General rule in cases of private contracts.**—The most common form, in which the question now to be considered arises, is where one or more of the sureties, at the time when they signed their names to the bond, stipulated that the bond, which was then undelivered, should not be delivered so as to take effect, until one or more specified persons should also affix their signatures to it as cosureties. As between the parties to a private contract of suretyship, the general rule, that a surety is not bound, who affixed his name to it on condition that it should not take effect, as to him, until another signed it as a cosurety, if the creditor accepts it without such additional signature, and with notice, express or implied, of the condition, has been established in several cases in England and in the United States.¹ But if the creditor has no express notice of the condition, and there is nothing on the face of the contract, or in the attending circumstances, sufficient to charge him with implied notice thereof, and he, or others for whose benefit the

Treasurers v Hilliard, 8 Rich. L. (S. C.) 412;

McDowell v Burwell, 4 Rand. (Va.) 317;

Fletcher v Chapman, 2 Leigh (Va.) 560.

See also *Renfroe v Colquitt*, 74 Ga. 618, *ante*, § 255.

¹ *Evans v Bremridge*, 8 De Gex, McN. & G. 100;

Evans v Bremridge, 2 Kay & J. 174;

Jordan v Loftin, 13 Ala. 547;

Guild v Thomas, 54 Ala. 414;

Coffman v Wilson, 2 Met. (Ky.) 542;

Bivins v Helsley, 4 Met. (Ky.) 78;

Clements v Cassilly, 4 La. Ann. 380;

Readfield v Shaver, 50 Me. 36;

Hall v Parker, 37 Mich. 590;

Dunn v Smith, 20 Miss. 602;

Read v McLemore, 34 Miss. 110;

Goff v Bankston, 35 Miss. 518;

Fales v Filley, 2 Mo. App. 345;

Hill v Sweetser, 5 N. H. 168;

Cowan v Baird, 77 N. C. 201;

Miller v Stem, 12 Pa. St. 383;

Smith v Doak, 3 Tex. 215;

Pawling v United States, 4 Cranch (U. S.) 219;

United States v Hammond, 4 Biss. (U. S.) 283;

Ward v Churn, 18 Gratt. (Va.) 801;

King v Smith, 2 Leigh (Va.) 157; and cases hereinafter cited.

contract was made, have relied thereupon; the surety is holden, as if there had been no condition.¹ Most of the adjudications, where this question arose upon an official bond, hold or assume that the rule is the same, with respect to such a bond, and a private contract of suretyship; although, as we shall presently endeavor to show, there is a broad distinction, upon which the solution of the question turns, between the two kinds of securities.

§ 260. **Rulings of U. S. courts, as to the rule in case of official bond.**—In an early case, the United States supreme court held, that where an official bond was executed by some of the sureties named in the body thereof, and intrusted by them to the principal obligor in escrow, to take effect upon its being executed by the others; and he delivered it without the signatures of the latter; the sureties were not liable.² But in a subsequent case, in an action upon a distiller's bond, where the bond was perfect upon its face, executed by all whose names appeared in the body of it, and actually delivered to the proper revenue officer without any stipulation; the same court held that the sureties could not avoid liability, on the ground that they signed it on condition that it should not be delivered, unless it was executed by another who did not execute it, where the officer receiving it had no notice of the condition, and there was nothing to put him upon inquiry. Davis, J., after referring to the case last cited, said that it went upon the ground, that the additional sureties to be procured were named in the body of the bond; and that if, in the case then before the court, the additional surety's name appeared in the bond, the defence would be sustained, because that would have been notice to

¹ *Deardorff v Foresman*, 24 Ind. 481;
Hessell v Johnson, 63 Mich. 623;
Dair v United States, 16 Wall. (U. S.) 1;
Nash v Fugate, 24 Gratt. (Va.) 202; s.
 c. 32 Gratt. (Va.) 595;

Lyttle v Cozad, 21 W. Va. 183; and cases
 hereinafter cited.

² *Pawling v United States*, 4 Cranch (U.
 S.) 219.

the agent of the government that the bond was incomplete, sufficient to put him upon inquiry; and that “in any case, if the bond is so written, that it appears that several were expected to sign it, the obligee takes it with notice that the obligors who do sign it can set up in defence the want of execution by the others, if they agreed to become bound only on condition that the other cosureties joined in the execution.”¹

§ 261. **Rulings of the New York courts on same subject.**—In New York, where an action was brought upon a bond to the people, given upon a loan to a bank of a portion of the canal fund, and conditioned for the repayment of the money; the sureties’ defence was that the bond, after they had signed it, was handed by them to the president of the bank, “with the distinct understanding” that it was not to be used, until it was signed as cosurety by one D. The bond upon its face appeared to be complete, D’s name not appearing in it, and their being no blank left in it for his name. It was delivered by the president of the bank to the state auditor, without D’s signature. The court of appeals sustained the defence, on the ground, that, as to the sureties, the bond never had any legal existence, since it was never delivered as their act and deed.² This ruling has been much criticized in other states, and in a later case, the same court intimated a doubt whether it was correct. In the later case referred to, the action was brought upon a bond of a deputy collector of internal revenue to the collector. At the time when the sureties signed it, it contained the name of J in the body of it, as one of the sureties, and the principal informed them that J would sign it, and they expected that he would do so; but the name of J was stricken out, and the bond delivered to the collector, he having no

¹ *Dair v United States*, 16 Wall. (U. S.) 1.

² *People v Bostwick*, 32 N. Y. 445, aff’g 43 Barb. (N. Y.) 9.

notice of the facts. The court held that the erasure of J's name was not sufficient to charge the collector with notice, and that the defendants were liable, there having been no agency for the principal on the part of the person who received the bond, as in the last case cited.¹ However, rulings, resting upon principles similar to those declared in *People v. Bostwick*, have since been made in the courts of New York.² But in a recent case in the supreme court of that state, it was said, that whether or not *People v. Bostwick* has been weakened as authority, the rule there laid down has not been extended beyond the facts of that case; and in that case the officer who received the bond was told, that the person, whose name was missing, would call and sign the bond; and he answered that it was good enough as it was. This action was upon a guardian's bond to the plaintiff, the ward, then an infant; and the surety's defence was that it was executed upon an agreement between him and the plaintiff, that it should not take effect, until it was also executed by one of three other persons named; and that, if not so executed, it should be returned to him. A verdict for the plaintiff was sustained. The court said that the rule is, that "where there is nothing upon the face of the paper, indicating that other sureties were expected to become parties to the instrument; and no fact is brought to the knowledge of the obligee, before he accepts the instrument, calculated to put him on guard in respect to that point, and to induce him, in the exercise of ordinary and reasonable caution and prudence, to make inquiry before accepting the security; the fault cannot be said to rest to any extent on the obligee, and the failure to procure other sureties is no defence." In this case, it was said, notice to the plaintiff was of no effect by reason of

¹ *Russell v Freer*, 56 N. Y. 67.

Benton v Martin, 52 N. Y. 570;

² *Grimwood v Wilson*, 31 Hun (N. Y.) 215;

Bookstaver v Jayne, 60 N. Y. 146, rev'g
3 T. & C. (N. Y.) 397.

her minority, and the bond was not to take effect on its delivery to her, but upon the filing thereof in the surrogate's office.¹

§ 262. **Rulings in Indiana, Michigan, and Iowa on same question.**—The same doctrine has been affirmed by the supreme court of Indiana in several cases. In one, which was an action on the official bond of a county treasurer, it was held, that where a bond is executed and delivered to the principal obligor by a surety, upon condition that certain other persons shall execute it, before it is delivered to the obligee; and it is delivered without their having executed it, and received by the obligee without notice of the condition, or any circumstances which should put him on inquiry; the condition imposed will not avail the surety. It is not a question of the power of the principal to deliver the bond in its apparently perfect condition, but a question of estoppel.² In Michigan, it has been held, that where a person signs his name in blank as surety in an official bond, and delivers it to his principal to have it completed, and signed by others, and delivered to the proper authority; he makes the principal his agent for the whole business, and is estopped and bound by his action in filling it up and delivering it, without the additional signatures. The court said: "Public officers cannot be expected to leave their offices to run about and hunt up every one whose signature is genuine, to ask if there is any reason for doubting the correctness of documents."³ But in Iowa, it has been held, that where several sureties execute an

¹ *Bangs v Bangs*, 41 Hun (N. Y.) 41.

² *State v Pepper*, 31 Ind. 76, following *Deardorff v Foresman*, 24 Ind. 481; *Blackwell v Stato*, 26 Ind. 204, and *Webb v Baird*, 27 Ind. 368, and overruling *Pepper v State*, 22 Ind. 399. The same doctrine was re-affirmed in

State v Garton, 32 Ind. 1; *Hunt v State*, 53 Ind. 321; *Mowbray v State*, 88 Ind. 324.

³ *McCormick v Bay City*, 23 Mich. 457. Accord, *Smith v Peoria County*, 59 Ill. 412.

official bond, and intrust it to the principal; and he, before delivering it, erases the name of one of the sureties, without the consent of the others; this discharges all the sureties, whether they had executed before or after the person whose name was erased.¹

§ 263. **Other cases elsewhere.**—The foregoing cases seem to agree in establishing the rule, although they assign different reasons for their conclusion, that the defence of the sureties rests upon the question, whether the obligee, or, in an official bond, the approving officer, had actual notice, or was chargeable with notice, of the condition upon which the bond was signed by the sureties; and that the presence, in the body of the bond, of the name of a person whose signature does not appear upon it when it is delivered, is sufficient to charge him with such notice. The same doctrine, or one very nearly approaching thereto, has been affirmed in several other cases cited in the note.²

§ 264. **The author's criticisms upon the doctrine.**—But it may well be doubted, whether so much of this rule

¹ *State v Craig*, 53 Iowa 238.
See also *Allen v Marney*, 65 Ind. 398.

² *Crawford v Foster*, 6 Ga. 202;
Smith v Peoria County, 59 Ill. 412;
Pepper v State, 22 Ind. 399;
State v Pepper, 31 Ind. 76;
Mowbray v State, 88 Ind. 324;
Wildcat Branch v Ball, 45 Ind. 213;
Carroll Co. v Ruggles, 69 Iowa 280;
Taylor County v King, 73 Iowa 153;
Chamberlin v Brewer, 3 Bush (Ky.) 561;
Whitaker v Crutcher, 5 Bush (Ky.) 621;
Millett v Parker, 2 Met. (Ky.) 608;
Police Jury v Haw, 2 La. (Miller) 41;
Canal and Bkg. Comp'y v Brown, 4 La. Ann. 545;
York County M. F. Ins. Comp'y v Brooks, 51 Me. 506;
State v Peck, 53 Me. 284;

Readfield v Shaver, 50 Me. 36;
Stevenson v Bay City, 26 Mich. 44;
Linn County v Farris, 52 Mo. 75;
State v Potter, 63 Mo. 212;
State v Baker, 64 Mo. 167;
Cutler v Roberts, 7 Nebr. 4;
Gwyn v Patterson, 72 N. C. 189;
Bramley v Wilds, 9 Lea (Tenn.) 674;
Quarles v Governor, 10 Humph. (Tenn.) 122;
Duncan v United States, 7 Pet. (U. S.) 435;
Fletcher v Austin, 11 Vt. 447;
Washington Probate Court v St. Clair, 52 Vt. 24;
Ward v Churn, 18 Gratt. (Va.) 801;
Nash v Fugate, 24 Gratt. (Va.) 202;
Wendlinger v Smith, 75 Va. 309.

as assimilates the officer, approving an official bond, to the obligee or promisee in a private contract of suretyship, or his agent who accepts the contract, is founded upon sound principles. It was well said, in one case, that an approving officer's powers and duties are limited to the inquiry, whether the bond is in all respects according to law, and the sureties are sufficient.¹ His powers and duties are defined by statute; and all the parties to the bond are chargeable with notice thereof, and that they cannot be extended by implication. He has no power to reject a bond for erasures, etc., or because he has reason to suspect that the sureties would, by reason of some extrinsic fact, be able to defend successfully an action upon it. Nor is an approval equivalent to an acceptance of the bond; it remains undelivered, and consequently invalid, until, after the approval, it is filed by the obligees, or some of them, with a clerk or other purely ministerial officer. There is, therefore, no point of time, between the execution of the bond and the delivery thereof, when it is possible to charge the public, which is the real party to the bond, with notice of any extrinsic matter, which would tend to invalidate it. It seems, therefore, that an official bond ought to constitute an absolute exception to the rule, which invalidates a contract of suretyship in consequence of such extrinsic matters. And this reasoning is equally applicable, where the obligee in the bond is a public officer: in such a case he merely represents the public or sovereign power, under a statute, which fixes all his powers and duties, and thus prevents him from becoming the general agent of the public.²

§ 265. **Additional seal not notice per se that another is to execute bond; and similar cases.**—Although the pres-

¹ *Ladd v Town Trustees*, 80 Ill. 233.

² The rules established by the weight of the American authorities, upon the questions considered under the

next two divisions of this chapter, rest upon reasons analogous to those stated in this section.

ence in the body of the bond, of the name of a person who has not executed it, may charge the obligee with notice of the condition, it has been held that the mere presence of an additional seal, is not sufficient for that purpose.¹ Where the record of a county court stated, that a sheriff elect and his sureties (naming them) came into court, and executed an official bond; and one of those named, who was present, did not sign the bond; it was held that neither of the sureties was liable.² But if a surety, who has signed a bond, on condition that it shall not take effect until others have signed it, is present when it is delivered without the additional signatures, and makes no objection, he waives the condition; and *a fortiori* where he delivers the bond.³ When a bond is not binding upon some of the sureties, by reason of the breach of a condition annexed to their signing the same, *semble*, that it is not binding upon those who afterwards execute it, in ignorance that it does not bind the former.⁴ But a surety does not escape liability upon the bond, merely because other sureties executed it, after he had executed it, whose names were not in the bond.⁵

§ 266. **Effect where principal is named in body, but does not execute bond.**—In the last preceding chapter, we have considered the question, whether an official bond is valid against the sureties, where it has not been executed by the principal.⁶ In connection with the question now under examination, we refer to cases where it was held, that sureties are not liable upon an official bond, signed by them alone, and accepted, without their knowledge, without the signature of the principal, who

¹ *Simpson v Bovard*, 74 Pa. St. 351, at p. 361.

² *Fletcher v Leight*, 4 Bush (Ky.) 303.

³ *State v Lewis*, 73 N. C. 138, at p. 143.
See also, *State v Peck*, 53 Me. 284.

⁴ *Pepper v State*, 22 Ind. 399. But the case was overruled, upon the principal points decided, in *State v Pepper*, 31 Ind. 76.

⁵ *Mowbray v State*, 88 Ind. 324.

⁶ *Ante*, § 195.

is named in the bond as the primary debtor; and that their liability upon such a bond cannot be established, without affirmative proof that they delivered it, to be operative against themselves only.'

X. Liability of a surety in an official bond, where the signature of a person, appearing therein as a co-surety, was forged, or otherwise affixed without the latter's authority.

§ 267. **Conflict of authorities; but recent cases hold surety liable.**—Upon this question, there has been some conflict of opinions, but the more recent cases hold that the surety is liable, although he executed the bond, in the belief that the other signature was genuine.² And it has been said in some cases, that by executing the contract of suretyship, the surety affirms that the previous signatures are genuine.³ Where a surety signed an official bond at the principal's request, after the other signatures had been placed thereupon, without reading it or hearing it read, or any information concerning it, except that it was "a county paper;" it was held, that the forgery of one of the signatures was no defence, as he evidently had not relied upon that signature.⁴

¹ *School Trustees v Sheik*, 119 Ill. 579;
Johnston v Kimball, 39 Mich. 187.
 See also, under a statute, *Bunn v Jet-*
more, 70 Mo. 228.
 S. P. as to unofficial bonds, *Hall v*
Parker, 37 Mich. 590: s. c. 39 Mich.
 287;
Bean v Parker, 17 Mass. 591, per *Par-*
ker, Ch. J., p. 604;
Wood v Washburn, 2 Pick. (Mass.) 24.
² *Stern v People*, 102 Ill. 540, approving
Stoner v Milliken, 85 Ill. 218, and

overruling *Seeley v People*, 27 Ill. 173.
 See also *Mathis v Morgan*, 72 Ga. 517;
Helms v Wayne Agr. Company, 73
 Ind. 325;
Chamberlain v Brewer, 3 Bush (Ky.)
 561;
Franklin Bk. v Cooper, 39 Me. 532;
State v Baker, 64 Mo. 167.

³ *York Co. M. F. Ins. Comp'y v Brooks*,
 51 Me. 506;
Selser v Brock, 3 Ohio St. 302.

⁴ *State v Pepper*, 31 Ind. 76.

XI. Liability of the sureties, as affected by a subsequent alteration of the officer's duties, or of the tenure of his office.

§ 268. **Leading English case holding surety discharged.**—The leading case in this subject was decided in the year 1856, by the court of queen's bench. An action was brought upon a bond, conditioned to indemnify the high bailiff of a county court, against any liability from the misconduct of a person appointed by him, to be one of the bailiffs. After the execution of the bond, the jurisdiction of the county court was extended by five different statutes, so as greatly to increase the amount in which it had jurisdiction, and to extend its jurisdiction to various other subjects, and change entirely the bailiff's fees. It was held that the sureties were discharged by the additional statutes. The lord chief justice said: "It may be considered settled law, that where there is a bond of suretyship for an officer, and by the act of the parties or act of parliament, the nature of the office is so changed, that the duties are materially altered, so as to affect the peril of the sureties, the bond is avoided." With him the other judges agreed, on the ground that the "effect of the increased jurisdiction was to so alter the court and the office of bailiff, as to affect the liability of the surety to his prejudice."¹

§ 269. **Other English cases to same effect.**—This case has been cited and discussed, in most of the subsequent cases upon the question under consideration; and in some of them, it has been severely criticized.² But as the bond on which the action was brought, although of an official character, was to all intents and purposes a private bond, it appears to have been well decided. In more modern English cases, it has been said, that where one is surety for

¹ *Pybus v Gibb*, 6 Ell. & Black. 902; 26 L. J., Q. B. 41; 3 Jur. N. S. 315.

² Ex. gr. per Ruger, Ch. J., 92 N. Y. 396, cited *post*, § 278.

another's good behavior in a particular office, and the principal is subsequently appointed to a perfectly distinct office, which is incompatible and inconsistent with the first office, the surety is discharged, although the duties under the two appointments are the same; but where he is subsequently appointed to an additional office which is not incompatible, the liability continues; that a change of duties, if the duties are materially altered, so as to affect the peril of the sureties, discharges the sureties; but if the change does not materially alter the duties, the bond is not avoided.¹

§ 270. **Rulings in U. S., following English rulings.**—The United States courts have, in general, followed the English rules as contained in the foregoing extracts;² and they have also been recognized and adopted in some cases in the state courts, as will be seen in our subsequent citations. But in most of the state courts, a broader rule is recognized.

§ 271. **American cases holding that sureties are not discharged.**—In a case decided by the court of appeals of the state of New York, an action was brought by the people, against the sureties in the official bond of a commissioner appointed in 1850, under an act, passed in 1837, to provide for loaning the money deposited by the United States with the state. The bond was conditioned for the

¹ *Malling Union v Graham*, 5 L. R. C. P. 201; 39 L. J., C. P., 74; 22 L. T., 789; 18 W. R. 674;

Skillett v Fletcher, 1 L. R., C. P., 217; 35 L. J., C. P., 154; 12 Jur. N. S. 295; 1 H. & R. 197; *aff'd* 2 L. R., C. P., 469; 36 L. J., C. P., 206; 16 L. T., 426; 15 W. R., 876;

Bartlett v Atty.-Gen., Park. 277;

Oswald v Mayor of Berwick, 5 H. L.

856; 2 Jur. N. S. 743;

Mayor of Berwick v Oswald, 1 E. & B. 295; 22 L. J., Q. B. 129.

² *Miller v Stewart*, 9 Wheat. (U. S.) 680; *United States v Kirkpatrick*, 9 Wheat. (U. S.) 720;

United States v Hillegas, 3 Wash. C. C. (U. S.) 70;

Postmaster General v Reeder, 4 Wash. C. C. (U. S.) 678.

faithful performance of the duties under that act. While he was in office, and after the bond was given, in the year 1850, the legislature enacted a statute, closing up the business of certain commissioners for loaning the state's money, and transferring it to the commissioners appointed under the act of 1837. Upon the expiration of his term in 1853, the commissioner was in default for \$2,134.59, of which \$500 consisted of money received by him under the act of 1850, and the residue of money received under the act of 1837. The sureties insisted that they were discharged by the change in the principal's duties under the latter act; but the court held that that they were liable for the full amount of the defalcation.* Grover, J., after admitting that the sureties would be discharged if the transaction was of a private nature, said: "The analogy between this class of cases and the contracts of individuals fails in this respect. In the latter, no alteration can be made without the mutual assent of both parties. In the former, the legislature have power at any and at all times to change the duties of officers; and the continued existence of this power is known to the officer and his sureties; and the officer accepts the office, and the sureties execute the bond, with this knowledge. It is, I think, the same in effect as though this power had been recited in the bond. Had this been done, it would not be claimed that the sureties were discharged by its exercise." The learned judge concluded that "any alteration, addition, or diminution of the duties of a public officer, made by the legislature, does not discharge his official bond or the sureties therein, so long as the duties required are the appropriate functions of the particular officer." Hunt, J., delivered an opinion to the same effect, examining the authorities upon the question, and showing that in those where it was held that the sureties were discharged, some were cases of private contract, while in

others the duties of the office had been essentially altered.¹ In a recent case, the same person was treasurer and tax receiver of a city; and an act was passed, after his official bond had been given, separating the school money from the other funds of the city, and requiring it to be paid over to the treasurer and tax receiver "in trust," to be kept separate by him, and paid out by him on the orders of the board of education of the city. In an action to recover for the misappropriation of the school money, the sureties insisted, that by requiring the school funds to be held "in trust," the legislature had changed the officer, as to those moneys, to a trustee of the board of education. But it was held that they were liable. The court said: "There is no special force in the words 'in trust' to justify such a construction. In his official capacity, the treasurer held all the public moneys in trust, whether any statute so specifically declared or not. The duties added by the act were in every sense official, because not different from the ordinary and usual duties of the office. The change effected was to require him to keep them" (the school funds) "separate, and answer for them to one department of the city government, instead of to the municipality. In this his official character and duties were not essentially altered."²

§ 272. **Weight of American authorities sustains this rule; cases and qualifications.**—The foregoing cases state substantially the principles established by the weight of the American authorities; as shown by the cases cited in the note;³ although, in some of the cases, expressions are

¹ *People v Vilas*, 36 N. Y. 459; 3 Abb. Pr. N. S. (N. Y.) 252, disapproving *Bartlett v Att'y-Gen.*, Park., 277, and *United States v Kirkpatrick*, 9 Wheat (U. S.) 720.

² *Board of Education v Quick*, 99 N. Y. 138.
A similar ruling was made in Ohio.

Dawson v State, 38 Ohio St. 1.
See also *Mayor, etc., v Kelly*, 98 N. Y. 467;
King v Nichols, 16 Ohio St. 80.

³ *Walker v Chapman*, 22 Ala. 116;
Governor v Ridgway, 12 Ill. 14;
People v McHatton, 7 Ill. 638;
Compher v People, 12 Ill. 290;

found, to the effect that the sureties are not bound for the discharge of duties, subsequently added to the office, "unless their affinity to the office is plain and obvious."¹ But with respect to the application of the principles to particular circumstances, and, in some instances, with respect to the principles themselves, the cases are not uniform.

§ 273. **Extension of principal's term, or time for him to account.**—Thus it has been held, in one state, that where a statute extended an officer's term six months, the sureties continued to be liable for the additional time, although he failed to give a new bond, as the statute required, because the constitution provided that the officer should hold over until his successor should qualify.² But in other states, it has been held, under the same circumstances, that the sureties were not liable for the additional time.³ So, in the majority of the cases, it has been held, that a statutory extension of the time, within which the officer is required to pay over money in his hands, does not discharge his sureties.⁴ So also, if the statute confers upon the trustees of a village power to renew the tax collector's warrant from time to time, his sureties are not discharged by such a renewal, without their con-

People v Blackford, 16 Ill. 166;
Kindle v State, 7 Blackf. (Ind.) 586;
Bartlett v Governor, 2 Bibb. (Ky.) 586;
Colter v Morgan, 12 B. Mon. (Ky.) 278;
Graham v Washington County, 9
 Dana (Ky.) 182;
White v Fox, 22 Me. 341;
State v Carleton, 1 Gill (Md.) 249;
Marney v State, 13 Mo. 7;
Comm. v Holmes, 25 Gratt. (Va.) 771.

¹ *White v East Saginaw*, 43 Mich. 537,
 per Graves, J., p. 569, citing *Kitson v*
 Julian, 4 Ell. & Bl. 854;
Mayor, etc., v Crowell, 40 N. J. L. 207;
Citizens' Loan Ass'n v Nugent, 40 N.
 J. L. 215;

Brown v Sneed, 77 Tex. 471;
Gaussen v United States, 97 U. S. 584;
Comm. v Holmes, 25 Gratt. (Va.) 771.
² *Comm. v Drewry*, 15 Gratt. (Va.) 1.
³ *Brown v Lattimore*, 17 Cala. 93;
 Mullikin v State, 7 Blackf. (Ind.) 77.
⁴ *State v Carleton*, 1 Gill (Md.) 249;
State v Swinney, 60 Miss. 39;
Worth v Cox, 89 N. C. 44;
Chandler v State, 1 Lea (Tenn.) 296,
 cited *ante*, § 215;
Nashville v Knight, 12 Lea (Tenn.) 700;
Comm. v Holmes, 25 Gratt. (Va.) 771;
Smith v Comm., 25 Gratt. (Va.) 780.
 See also, *Crawn v Comm.*, 84 Va. 282.

sent, for they executed the bond with express or implied knowledge of the existence of such a power.¹ But the adjudications are not harmonious upon this point; for in some of them it has been held that such an extension discharges the sureties, since it postpones the right of action upon the bond without their consent;² but that a statute postponing the time of holding a term of a court, at which the taxes are to be paid, does not discharge the tax collector's sureties, although it incidentally extends his time for payment.³ An order of the county court, thus extending the time, does not discharge the sureties, since it is not binding.*

§ 274. **Addition of new districts and redistricting county.**—Where the bond was for faithful performance of the officer's duties, as collector of the United States taxes for eight specified townships, and the appointment was afterwards extended to another township; it was held that the sureties were not liable for taxes, subsequently collected by the officer.⁵ But where a deputy assessor gave a bond to the assessor for faithful performance of "the duties of the said office of deputy assessor," during his continuance therein, and the county was afterwards redistricted; it was held that his sureties were liable for a subsequent default.⁶

§ 275. **Change of compensation, or postage rate, or mode of payment of customs charges; revision of ordinances.**—The liability of an officer's sureties is not affected by the increase or diminution of his salary or fees;⁷ nor, where the officer is a postmaster, by the increase or diminu-

¹ *Olean v King*, 116 N. Y. 355, aff'g 42 Hun (N. Y.) 651.

² *People v McHatton*, 7 Ill. 638.

³ *Lane v Howell*, 1 Lea (Tenn.) 275.

² *Davis v People*, 6 Ill. 409;

⁵ *Miller v Stewart*, 9 Wheat. (U. S.) 680.

State v Roberts, 68 Mo. 234;

⁶ *Kruttchnitt v Hauck*, 6 Neva. 168.

Johnson v Hacker, 8 Heisk. (Tenn.) 388.

⁷ *Sacramento County v Bird*, 31 Cal. 66.

tion of the rates of postage.¹ Nor is the liability of a city officer's sureties affected by the revision of the city ordinances, and the repeal of the former ordinances, with a proviso that the repeal shall not affect the tenure of any office, or any forfeiture or penalty already incurred.² Where the mode of payment of the customs duties, in the republic of Texas, was changed, after a collector's bond had been given; it was held that the sureties' liability was not affected by the change, because the collector was bound to receive such payments as the statute directed, and to pay them over *in specie*.³

§ 276. **The case of a waterworks superintendent, and of a clerk who was required to collect license fees.**—Where, after the superintendent of the waterworks of a city had voluntarily given an official bond, he was required by an ordinance to collect the water rents, it was held, that his sureties were not liable for his default with respect to the water rents, on the ground that the collection thereof was not within the scope of a superintendent's duty, and so not within the fair construction of the condition of the bond.⁴ So, where a statute required the clerk of a court to collect an account for the license fees of attorneys, it was held, that the sureties in his bond, previously given, were not liable for his default with respect to such fees.⁵

§ 277. **The author's comments upon the rule, and suggestions.**—It seems somewhat inconsistent with the principles, upon which the cases were decided, which hold that the officer and his sureties contract with reference to the power of the legislature at any time to change the officer's duties, to limit the continued liability of the sureties in an official bond running to the sovereign power, or

¹ *Postmaster-General v Munger*, 2 Paine (U. S.) 189.

² *Cambridge v Fifield*, 126 Mass. 428.

³ *Borden v Houston*, 2 Tex. 594.

⁴ *Lafayette v James*, 92 Ind. 240.

⁵ *Denio v State*, 60 Miss. 949.

to a particular body or officer as its representative, to duties of the same general character, as those which were imposed upon him when the bond was given. The rule, which discharges the surety in a private contract from liability, where such an alteration is made, rests upon the idea that the contract has been altered by dealings between the principal and the obligee; for such an alteration cannot take place without the assent of both. But in the case of an alteration by the sovereign power, the principal's consent is eliminated from the transaction; and if the obligor's contract is made, with reference to the known power of the real obligee to alter the contract at pleasure, there seems to be no limit to the alteration which may be made, without affecting the liability of the sureties; and since this stipulation is deemed to be incorporated into the contract, the provision of the United States constitution, against impairing the obligation of contracts, cannot apply to such a case.

§ 278. **Where new duties are imposed, bond not invalidated.**—Although the American cases are not entirely uniform, with respect to the sureties' liability for defaults in duties imposed upon the officer, after the execution of the bond, they substantially agree in holding, that such imposition of new duties does not invalidate the bond, as an undertaking for the faithful performance of the duties which were originally imposed upon him, and which he continues to discharge, in addition to the new duties.¹ In the state of New York, the same rule was applied in a case, where the board of supervisors of a county, under the general authority conferred upon them by statute, imposed upon the county treasurer, during his term of office, the duty of raising, keeping, and disbursing large sums of money for county purposes, during the civil war. The court, after remarking that the defalcation, for which the

¹ *Gausson v United States*, 97 U. S. 584.

action was brought, did not arise out of the duties added to those, which devolved upon the officer when the bond was given, cited and approved the case last cited, and continued: "Such is the uniform course of decisions in the United States, and the rule is now too well settled to be controverted. The case of *Pybus v. Gibb*, 6 Ell. & Bl., 902,¹ which supports the contrary rule, has been uniformly repudiated in this country, whenever it has been cited as an authority."² This doctrine has been also declared and applied in the cases cited in the note.³

§ 279. **Liability where new duties imposed before bond, or where bond provides for duties "now or hereafter" imposed.**—When the bond is given after the new duties have been imposed, the sureties are, of course, liable for defaults with respect to such duties, unless the statute also requires a special bond for the latter.⁴ And the sureties' liability is not affected by any subsequent change in the officer's duties, where the bond, as provided in some states by statute, is conditioned for the performance of "all the duties, now or hereafter required" from the officer by law.⁵

¹ Cited *ante*, § 268.

² *Supervisors v Clark*, 92 N. Y. 391, *aff'g* 25 Hun (N. Y.) 282.

³ *Colter v Morgan*, 12 B. Mon. (Ky.) 278;

White v Fox, 22 Me. 341;

Hatch v Attleborough, 97 Mass. 533;

Mayor, etc., v Sibberns, 3 Abb. Ct. App. (N. Y.) 206; 35 How. Pr. (N. Y.) 408;

Comm. v Holmes, 25 Gratt. (Va.) 771.

See also *Lafayette v James*, 92 Ind. 240;

White Sew. Mach. Comp'y v Mullins,

41 Mich. 339;

Mumford v Memphis, etc., R. R. Comp'y, 2 Lea (Tenn.) 393;

United States v Kirkpatrick, 9 Wheat. (U. S.) 720.

⁴ *Marquette Co. v Ward*, 50 Mich. 174;

State v Bradshaw, 10 Ired. L. (N. C.) 229.

See also *Board of Education v Quick*, 99 N. Y. 138.

⁵ *Mahaska County v Ingalls*, 14 Iowa 170.

See also *Morrow v Wood*, 56 Ala. 1.

XII. Effect upon the liability of the sureties in an official bond, of the acts or omissions of other officers, including transactions between them and the principal in the bond.

§ 280. **Some of rules governing private contracts of suretyship inapplicable.**—In this class of cases, as in some of those previously considered, we shall find that the peculiar character of the real obligee in the bond, renders inapplicable some of the rules, which govern in private contracts of suretyship.

§ 281. **General rule that government not liable for acts or omissions of officers.**—With respect to negligence, laches, or other misconduct of officers, the general rule has been well laid down by the United States supreme court as follows: “The government is not responsible for the laches or the wrongful acts of its officers. Every surety upon an official bond to the government is presumed to enter into his contract, with full knowledge of this principle of law, and to consent to be dealt with accordingly. The government enters into no contract with him, that its officers shall perform their duties. A government may be a loser by the negligence of its officers; but it never becomes bound to others for the consequences of such neglect, unless it be by express agreement to that effect.”¹

§ 282. **Effect of settlements, etc., between principal and auditing officer.**—Although a fair and reasonable settlement of a doubtful matter, between a financial officer, and those officers who are required by law to examine and audit his accounts, will not be reopened at the instance of the successors of the latter; the same strictness is not applied, as in the case of private persons; and a mistake will be rectified, even in a case where the settle-

¹ Hart v United States, 95 U. S. 316, per Walte, Ch. J.

ment would be conclusive, if the question arose between private persons.¹ Thus, where the supervisors, in settling a county treasurer's account, allowed him to retain, as a perquisite of office, interest upon deposits of money of the county, received by him; it was held that their successors might recover the amount thereof, in an action against the sureties.² So where the selectmen failed to discover, in settling the treasurer's accounts, an error in addition against the town, it was held that their successors might recover the amount thereof from the sureties, although the treasurer was then solvent, and had since become insolvent.³ So where the county board authorized the county treasurer to retain \$2000 for his services in selling tax certificates, and settled his accounts on that basis; it was held that the sureties were not discharged as to the \$2000, as the board had no power to make such an allowance.⁴

§ 283. **The same subject ; omission to proceed against principal ; laches and omissions of other officers.**—So, in an action upon the official bond of a county treasurer, conditioned for faithful performance and disbursement, and also to “render a just and true account thereof to the board of supervisors,” etc.; where it appeared that the supervisors had annually adjusted the treasurer's account, as required by law, but that he had nevertheless misapplied and wrongfully appropriated certain sums; it was held that the defendants were liable for such sums. The court said: “The board of supervisors and the treasurer were alike the agents of the county, as a body politic and corporate, and the acts and neglects of one

¹ *Supervisors v Birdsall*, 4 Wend. (N. Y.) 453.

See also *Boardman v Flagg*, 70 Mich. 372;

Britton v Fort Worth, 78 Tex. 227.

² *Supervisors v Wandel*, 6 Lans. (N. Y.) 33.

³ *Farmington v Stanley*, 60 Me. 472.

⁴ *Sup'rs v Knipfer*, 37 Wis. 496.

Accord, *Wilson v Glover*, 3 Pa. St. 404.
See further on this subject, *ante*,
§§ 208, 217, 245.

agent cannot affect or detract from the liability of another agent, or of the sureties of either to the common principal. The board of supervisors owed no duty to the defendants, the appellants. The law, while it imposes upon the supervisors the duty of examining the accounts of county treasurers, does not guaranty to the sureties the performance of that duty, or make the omission or negligent performance of it available to the sureties, as a release from their obligations, or a defence to an action upon the bond of suretyship." It was also held that "there was none of the elements of an equitable estoppel available to the sureties."¹ In another case in the same court, it was held, that it was no defence to the sureties of a tax collector, that, if a warrant against their principal as a delinquent collector had been issued by the county treasurer, as directed and within the time prescribed by law, the amount of his defalcation might have been collected from him; and this, although such a warrant is a condition precedent to maintaining an action upon the bond; because the provision for a warrant was for the benefit of the public, and did not form a part of the contract of the sureties.² The doctrine, that the sureties of a public officer are not discharged by laches or omissions of another officer or board of officers to take proceedings against the principal, or to settle his accounts as required by law, although such laches have been gross and unreasonable, and the principal has meanwhile become insolvent, has been established in numerous other cases.³ So the sureties of a disbursing officer of the United States are liable for his defalcation, with

¹ *Supervisors v Otis*, 62 N. Y. 88, at p. 96;
Accord, County Com'rs v Mac Rae, 89
 N. C. 95.

Looney v Hughes, 26 N. Y. 514, aff'g 30
 Barb. (N. Y.) 605.

² *Collins v Gwynne*, 2 Moore & Scott,

640; 9 Bing. 544;
People v Jenkins, 17 Cala. 500;
Bonta v Mercer Co. Court, 7 Bush (Ky.)
 576;
Duncan v State, 7 La. Ann. 377;
Mayor, etc., v Merritt, 27 La. Ann. 568;

respect to money advanced to him, without the express direction of the president, as the act of congress requires.¹ The effect of the appropriation by the principal, with the consent of an auditing officer, of money received by the principal in one year, to make up a deficiency in his accounts for a preceding year, has been considered elsewhere.²

§ 284. **Effect of improper transactions between principal and receiving or auditing officers.**—Where a tax collector's bond, which by law must run to the town, ran to the treasurer; if the latter, on the collector's offering him the tax money, agrees with the collector that he may keep the money for a time, and pay his own debts with it, the collector's sureties are discharged *pro tanto*. But the court said: "Whether such an agreement between the treasurer and the collector would have exonerated the sureties, if the bond had been given to the town, as it ought to have been, instead of the treasurer, it is not necessary to inquire."³ Where an officer consents to the use of public money by his deputy in his own business, that discharges the sureties on the deputy's bond to him, for the money so used.⁴ But here the contract is

Mayor, etc., v Redmond, 28 La. Ann. 274;

Farmington v Stanley, 60 Me. 472;

Freaner v Yingling, 37 Md. 491;

Detroit v Weber, 26 Mich. 284;

People v Russell, 4 Wend. (N. Y.) 570;

Supervisors v Wandel, 6 Lans. (N. Y.) 33;

McKecknie v Ward, 58 N. Y. 541, overruling People v Jansen, 7 Johns. (N. Y.) 332;

Comm. v Wolbert, 6 Binn. (Pa.) 292;

Pittsburg, etc., R. R. Comp'y v Shaef-fer, 59 Pa. St. 350;

City Council v Paterson, 2 Bailey L. (S. C.) 165;

United States v Kirkpatrick, 9 Wheat. (U. S.) 720;

United States v Vanzandt, 11 Wheat. (U. S.) 184;

United States v Nicholl, 12 Wheat. (U. S.) 505;

Dox v Postmaster-General, 1 Pet. (U. S.) 318;

Smith v United States, 5 Pet. (U. S.) 292;

United States v Boyd, 15 Pet. (U. S.) 187;

Jones v United States, 18 Wall (U. S.) 662;

Smith v Comm., 25 Gratt. (Va.) 780;

Crawn v Comm., 84 Va. 282.

¹ United States v Cutter, 2 Curtis (U. S.) 617.

² *Ante*, § 219.

³ Johnson v Mills, 10 Cush. (Mass.) 503.

⁴ Pickering v Day, 3 Houst. (Del.) 474.

practically a private one. It has been held, however, that if county commissioners take from the county treasurer his note, and a mortgage upon land, in payment of his defalcation, that discharges the treasurer's sureties.¹ In another case it was held, that where the mayor and common council allowed a city treasurer to use public money for his own benefit, the treasurer's sureties were liable for such money.² A surety who consents is not discharged by the release of a mortgage, held as security for a treasurer's defalcation; but a cosurety, not consenting, is discharged thereby.³ Where the same person was tax collector and treasurer, and settled his accounts as collector with the auditor, and received a certificate from the auditor, that a certain sum was due from him, which was afterwards found in the treasury; it was held that the presumption was that the money was then deposited; and, a defalcation having occurred, and there being no proof when it occurred, that the presumption was that it occurred after the deposit, and the sureties in the bond as treasurer were liable therefor.⁴

§ 285. **Illegal cancellation; statutory settlement, or by authority by city council; quere, if sureties discharged, etc.**—The illegal cancellation of an official bond does not affect the liability of the sureties therein.⁵ Although a settlement of accounts, as we have seen, is not conclusive in favor of the sureties, against the obligee in the bond, or the sovereign power represented by the obligee, a settlement pursuant to the statute is conclusive against a third person, seeking to hold the sureties liable for the officer's misconduct, to the plaintiff's injury.⁶ Where a city charter authorized the council to settle the accounts of the outgoing treasurer, and he gave, in payment of a

¹ Goodin v State, 18 Ohio 6.

⁴ Butte Co. v Morgan, 76 Cal. 1.

² Manley v Atchison, 9 Kan. 358.

⁵ Rochereau v Jones, 29 La. Ann. 28.

³ Mayor v Blache, 6 La. (Curry) 500.

⁶ Missouri v Winterbottom, 123 U. S. 215.

balance due from him, a certificate of deposit in a bank, which immediately afterwards failed; it was held that the sureties might show, in defence of an action upon his bond, that the council had ratified his action.¹ Where a collector of the United States internal revenue had given a bond in \$10,000; and, being indebted to the United States in a sum exceeding the penalty, made a deed of property to the United States to secure his indebtedness, having previously transferred \$10,000 to his sureties to procure their exoneration; and they applied the money accordingly, and were discharged by the treasury department; it was held that the discharge was valid, although the department had no knowledge, when the discharge was given, that the \$10,000 were received from the collector.²

§ 286. **Certain facts not defences in action upon disbursing officer's bond.**—The principle, that the government, or its representative, the obligee, is not responsible for the negligence or other misconduct of other officers, is well illustrated in the ruling that the sureties in a tax collector's bond cannot defeat a recovery upon the bond, by proof that the collector was a defaulter when he was appointed, and that the appointing officers knew that fact but did not disclose it;³ and this, although the statute expressly forbids such an appointment;⁴ or the appointing board falsely represented that the accounts for the preceding term had been settled.⁵ So the failure of the proper officers to remove a delinquent financial officer, pursuant to the directions of the statute, is not a defence to an action against the sureties for a subsequent defal-

¹ *Lansing v Wood*, 57 Mich. 201.

² *United States v Cochran*, 2 Brock. (U. S.) 274.

³ *Frownfelter v State*, 66 Md. 80;
Pine Co. v Willard, 39 Minn. 125.

See also *State v Rushing*, 17 Fla. 226;
Crawn v Comm., 84 Va. 282.

⁴ *Boreland v Washington County*, 20 Pa. St. 150.

⁵ *Palmer v Woods*, 75 Iowa, 402.

cation.¹ Where the county commissioners erroneously advertised, that a tax collector had paid up all his liabilities for a preceding term of office; and the defendants became his sureties for a new term, in reliance upon the advertisement; it was held that they were nevertheless liable.² Where one officer is surety for another, who is in default, the continuance of payment of the former's salary, which had been retained, and applied to the defalcation, and the settlement and closing up of his accounts, do not affect his liability as surety for the defaulter.³

§ 287. **A Pennsylvania case where part of taxes were collected by collector de facto.**—In Pennsylvania, where county commissioners appointed A tax collector, and issued to him the warrant and other papers for collection of the taxes, but he failed to give a bond; whereupon they appointed B tax collector, who gave a bond, reciting that the tax warrant and other papers had been issued to him, but in fact they had not been and were not at any time issued to him; and B proceeded in the collection of the taxes, and paid over such as he collected; but A also collected some of the taxes, and did not pay them over; whereupon an action was brought to hold B and his sureties liable for taxes received by A, inasmuch as the bond by its terms covered all the county taxes; the court held that they were liable only for the taxes actually received by their principal.⁴

¹ *Stern v People*, 102 Ill. 540;
United States v Vanzandt, 11 Wheat.
 (U. S.) 181.

See also *Marlar v State*, 62 Miss. 677;

People v Berner, 13 Johns. (N. Y.) 383.

But this rule appears to be limited in New Jersey, in the case of a municipal officer, to the executive officers of the city; it has been said that if the common council knew of a previous defalcation, and did not remove the delinquent, his sureties

will not be bound. *Newark v Stout*,
 52 N. J. L. 35.

See also, *Mayor, etc., v Dickerson*, 45
 N. J. L. 38.

² *Bower v Washington Co. Com'rs*, 25
 Pa. St. 69.

See also *Detroit v Weber*, 26 Mich. 284;
State v Bates, 36 Vt. 387.

³ *United States v Beattie*, Gilp. (U. S.) 92.

⁴ *Cannell v Crawford County*, 59 Pa. St.
 196.

XIII. Defences of sureties, founded upon defects in the proceedings, whereby the principal acquired the office, or whereby he was charged with the liability, upon which the action against them is brought.

§ 288. **Obligors estopped from denying principal's title to office, and from questioning his power to act.**—It is well settled, that all the obligors in an official bond are estopped from denying the regularity of the officer's election or appointment;¹ or from showing that he was not duly sworn, or otherwise qualified;² or that he was ineligible;³ or from objecting to the sufficiency or approval of his official bond;⁴ or otherwise questioning his official character.⁵ Or, as the reason for the same result is expressed in other cases, the sureties of an officer *de facto* are liable in any case, where those of an officer *de jure* are liable.⁶

§ 289. **Effect of defective tax warrant; of unconstitutional statute.**—Where the warrant and tax lists, delivered to a tax collector, are defective in some material and jurisdictional particular, he may refuse to proceed to collect the taxes; but if he actually collects them, he and his sureties

¹ *People v Jenkins*, 17 Cal. 500;
People v Huson, 78 Cal. 154;
Boone County v Jones, 54 Iowa, 699;
Billingsley v State, 14 Md. 369;
Taylor v State, 51 Miss. 79;
State v Clark, 1 Head (Tenn.) 369;
Borden v Houston, 2 Tex. 594.

² *St. Helena Parish v Burton*, 35 La. Ann. 521;
Horn v Whittier, 6 N. H. 88;
State v Findley, 10 Ohio 51;
Lyndon v Miller, 36 Vt. 329;
Lane v Harrison, 6 Munf. (Va.) 573;

³ *Jones v Gallatin County*, 78 (Ky.) 491;

⁴ *People v Huson*, 73 Cal. 154;
Boone County v Jones, 54 Iowa 699;

State v Cooper, 53 Miss. 615;

⁵ *People v Jenkins*, 17 Cal. 500;
Shaw v Havekluft, 21 Ill. 127;
Basham v Comm., 13 Bush (Ky.) 36;
Byrne v State, 50 Miss. 688;
State v Rhoades, 6 Neva. 352;
Hall v Luther, 13 Wend. (N. Y.) 491;
Kelly v State, 25 Ohio St. 567;
Com'rs of Treasury v Muse, 3 Brev. (S. C.) 150;

Borden v Houston, 2 Tex. 594;
Monteith v Comm., 15 Gratt. (Va.) 172.

Lyndon v Miller, 36 Vt. 329;
State v Bates, 36 Vt. 387.

See, however, *Comm. v Jackson*, 1 Leigh (Va.) 485.

See also *post*, ch. 27.

are liable therefor, and cannot set up the defects in an action in the official bond.¹ If, however, the defect is material and jurisdictional, so that the collector could not lawfully levy the taxes, it is a defence to an action for failure to collect the taxes.² If the warrant was not delivered to the collector in season to enable him to give the statutory notice, and thus enforce the collection, this is not a defence to his sureties, without proof that he did not actually receive the taxes.³ The sureties of a tax collector are liable for taxes collected by him under an unconstitutional statute, although they would not have been liable if he had refused to collect them.⁴ And where the collector has collected part of the taxes, his sureties are liable for the money thus received, but not for taxes of which payment was refused, on the ground that he had no lawful authority to collect them.⁵

§ 290. **Rule where tax rate exceeds lawful rate; collector unlawfully receiving county warrants.**—So a county treasurer's sureties are liable for taxes collected by the treasurer, upon a duplicate in his hands, although the rate of taxes was in excess of the rate allowed by law." And where a tax collector accepts county warrants without authority, and the county treasurer receives them with-

¹ *Durham v Fowler*, 22 L. R., Q. B. Div. 394;

State v Rushing, 17 Fla. 226;

Johnson v Goodridge, 15 Me. 29;

Kellar v Savage, 17 Me. 444; s. c. 20 Me. 199;

Orono v Wedgewood, 44 Me. 49;

Brunswick v Snow, 73 Me. 177;

Waters v State, 1 Gill (Md.) 302;

Sandwich v Fish, 2 Gray (Mass.) 298;

Great Barrington v Austin, 8 Gray (Mass.) 444, at p. 446;

Wendell v Fleming, 8 Gray (Mass.) 613;

State v Harney, 57 Miss. 363;

Olean v King, 116 N. Y. 355;

State v Woodside, 9 Ired. L. (N. C.) 496

Webb County v Gonzales, 69 Tex. 455;

Mast v Nacogdoches Co., 71 Tex. 380.

² *Frankfort v White*, 41 Me. 537.

³ *Fake v Whipple*, 39 N. Y. 394, aff'g 39 Barb. (N. Y.) 339.

⁴ *Chandler v State*, 1 Lea (Tenn.) 296.

⁵ *Lincoln v Chapin*, 132 Mass. 470.

⁶ *Feigert v State*, 31 Ohio St. 432.

See also, *Morris v State*, 47 Tex. 583;

Swan v State, 48 Tex. 120.

out authority, and has credit for them in his account, the treasurer's sureties are liable for the amount.¹

§ 291. **Cases as to sheriff; clerk; tax collector; money illegally borrowed by county.**—So, in an action upon a sheriff's bond, to recover money collected by him under an execution, it is no defence that there was no judgment.² The sureties of a town treasurer, who, by reason of an error in the assessment roll, has collected a larger amount of taxes than was due, are liable for his failure to pay the whole amount, including the excess, to his successor; and this, although the supervisors have settled with him, and charged him only with the sum which he ought to have collected.³ The sureties of the clerk of a court are liable for money, turned over to him by his predecessor, although there was an irregularity in the manner in which the original deposit with the predecessor was made.⁴ So a clerk's sureties are liable for money, paid into court and received by the clerk, although it was not a legal tender.⁵ And the sureties for the receiver of public moneys in a land district, who has failed to pay over money received by him for public lands, cannot defend an action on the receiver's bond, on the ground of irregularities in the proceedings for the entry.⁶ But where the county illegally borrowed money for county purposes, by giving notes; and the money was received by the county collector, with the lawful money of the county; his sureties are not liable for his failure to disburse the borrowed money, but are liable for his failure to pay over the lawful money.⁷

¹ *Coleman v Pike Co.*, 83 Ala. 393.

² *State v Hicks*, 2 Blackf. (Ind.) 336.

See also, *Chinn v Perry*, 2 Blackf. (Ind.) 288;

Rollins v State, 13 Mo. 437;

Lawton v Erwin, 9 Wend. (N. Y.) 233.

³ *Bullwinkel v Guttenberg*, 17 Wis. 583.

Accord, Sutherland v Carr, 85 N. Y. 105.

⁴ *Heppe v Johnson*, 73 Cal. 265.

⁵ *Billings v Teeling*, 40 Iowa 607.

⁶ *Potter v United States*, 107 U. S. 126.

⁷ *Frost v Mixsell*, 38 N. J. Eq. 586.

XIV. Miscellaneous questions, relating to the amount recoverable against sureties, the formal proceedings necessary to found an action against them, and the like.

§ 292. **The general rule and exceptions.**—The scope of this work contemplates only the consideration of the general principles applicable to these subjects: and many of the questions relating thereto have been incidentally considered in the foregoing pages of this chapter. It has been said, and correctly, as a general proposition, that there is no distinction between the liability of a surety and that of the principal in the bond; and that the same act or neglect which will charge the principal, will also charge the surety.¹ But this proposition must be confined strictly to the bond, and to an action founded upon it; for the principal is liable, in other forms of action, for many acts and omissions, for which the sureties are not liable. And in many of the states, the forms of procedure are such, that, in an action upon the bond, a judgment may be rendered against the principal, and in favor of the sureties, where such an act or omission is proved. But in whatever form an action may be brought, the sureties of an officer will not be charged with liability in favor of a person, who was *particeps criminis* in the unlawful act, with respect to which the action is brought.²

§ 293. **Generally liable for actual damages; cases where liable only for nominal damages.**—As a general rule, subject to the exceptions just mentioned, and to another exception depending upon the amount of the penalty of the bond, sureties, like the principal, are liable

¹ *Seaver v Young*, 16 Vt. 658.

See also, *Charles v Hoskins*, 14 Iowa 471; (Pa.) 21.

McCaraher v Comm., 5 Watts & S.

² *McConnell v Simpson*, 36 Fed. R. (U. S.) 750.

for the actual damages sustained by the person aggrieved, by the misconduct or omission of the principal. A few cases, where questions as to the sum recoverable against the sureties were passed upon, have been already cited in this chapter.¹ In an action upon the bond of a recording officer, for negligently recording a deed reserving a lien, in such a manner as to make the amount of the lien less than it really was; it was held that the defendants were liable for nominal damages only, without proof that the full amount of the lien cannot be collected.² So the sureties of a sheriff, failing to make a return upon an order for the sale of mortgaged property, whereby the mortgagee was prevented from collecting the deficiency, are liable for the actual loss incurred.³ Where a constable sells mortgaged chattels under an execution, and delivers them to the purchaser, without requiring compliance with the mortgage, as the statute prescribes, this is a breach of the condition of his bond; but, as the sale and delivery do not transfer the absolute title to the purchaser, actual damages must be proved, to justify a recovery for more than nominal damages.⁴

§ 294. **Not liable beyond penalty of bond, except for interest, etc.**—The entire amount, for which the sureties are liable, is limited by the penalty of the bond; and after they have been charged with sums, which, in the aggregate, equal the penalty of the bond, they cannot be holden for any additional sums,⁵ except, perhaps, for an excess caused by charging them with interest, as to which the cases are not harmonious. But the bond is not

¹ *Ante*, §§ 248, 249.

² *State v Davis*, 117 Ind. 307; s. c. 96 Ind. 539.

³ *Boyd v Desmond*, 79 Cal. 250.

⁴ *Slifer v State*, 114 Ind. 291.

See also, *Lowell v Parker*, 10 Met. (Mass.) 309.

⁵ *State v Blakemore*, 7 Heisk. (Tenn.) 638;

Farrar v United States, 5 Pet. (U.S.) 373.
See also, *ante*, § 198.

discharged by the faithful accounting by the principal to the amount of the penalty; it stands good for losses and defalcations by him to that amount.¹

§ 295. **Rules as to necessity for demand.**—Where the statute expressly requires an officer to pay to his successor all moneys in his hands, and the bond is also conditioned to the same effect, an active duty is thereby imposed on the officer, “and a failure to perform it, constitutes a breach of the conditions of his bond.”² So, where a county treasurer settles his accounts annually with the supervisors, and fails to include therein items received during the year, for which he is chargeable.³ So, where an officer is removed, and delivers to his successor the books and papers pertaining to his office, but fails to pay the public money in his hands, this is a breach of his bond.⁴ And in such, and all similar cases, wherever the condition of the bond is broken, an action lies thereupon, without notice to or demand upon the principal; and interest is recoverable in such an action from the time of the breach.⁵ But where there is no fixed time, when the principal is bound to pay over the money, an action lies, and interest is chargeable, only after a special demand on him for payment.⁶

§ 296. **Expenses of neglected duties; transmission of money to principal; when state may sue.**—The sureties in an official bond to the United States, are liable for a

¹ *Potter v Titcomb*, 7 Me. 302.

² *Supervisors v Clark*, 92 N. Y. 391, at p. 397, aff'g 25 Hun (N. Y.) 282.

See also *Board of Education v Heckox*, 12 Week. D. (N. Y.) 206.

³ *Supervisors v Birdsall*, 4 Wend. (N. Y.) 453.

⁴ *School District v Lyford*, 27 Wis. 506.

⁵ *Id.*

⁶ *Frazier v Laughlin*, 6 Ill. 347;

Grayham v County Court, 9 Dana (Ky.) 182;

Cheshire v Howland, 13 Gray (Mass.) 321;

People v Gasherie, 9 Johns. (N. Y.) 71;

Supervisors v Clark, 92 N. Y. 391, aff'g 25 Hun (N. Y.) 282;

Moore v Treasurers, 1 Nott & McC. (S. C.) 214;

State v Bird, 2 Rich. (S. C.) 99;

See also, *Rader v Davis*, 5 Lea (Tenn.) 536.

reasonable, but not an extravagant compensation, paid by the government for the performance of duties neglected by the principal.¹ Sureties are not liable for money, delivered by the government to an official agent, for transmission to their principal, without proof that the money came to the latter's hands.² Where an officer admits the loss of public money, but insists that he has a good defence against an action for the same, the state is not bound to await until the expiration of his term of office, before commencing an action upon his official bond.³

¹ *United States v Wann*, 3 McL. (U. S.) 179.

² *Bryan v United States*, 1 Black (U.S.) 140

³ *State v Nevin*, 19 Neva. 162.

CHAPTER XIII

EVIDENCE OF TITLE TO A PUBLIC OFFICE

CONTENTS

- 297. Commission or certificate is best evidence of officer's title: many questions relating to evidence of title considered in other chapters.
- 298. Officer's commission not an appointment, but evidence thereof; cases where the commission is void for want of authority; other rulings relating to the effect of, and other matters relating to, a commission.
- 299. Special case in Louisiana, where each of two claimants to an office held a commission.
- 300. Proof that act is official may be made, by showing that party exercised the office; other instances where proof that he was officer *de facto* suffices.
- 301. Upon indictment for assaulting an officer in discharge of his duty, proof that he was officer *de facto* suffices.
- 302. Proof of exercise of a foreign office suffices, as in case of a domestic office.

§ 297. **Commission or certificate best evidence of title.**—Where the statute provides for a commission, to be issued by the executive department of the government, or for a certificate of election by the returning officers, or a certificate of appointment by the officer or body having the power of appointment; such commission or certificate is manifestly the best evidence of the officer's title, with or without accompanying evidence of the jurisdiction of the officer or body issuing the certificate, as the general rules of evidence may require. As we have shown, in a previous chapter, an oral appointment by an officer or body is invalid; and there must be some written evidence of the appointment, although it may be very

informal.¹ The consideration of the circumstances which suffice to render a person an officer *de facto*, in the absence of any proof that he is an officer *de jure*, belongs to and will be treated in a subsequent chapter;² so that this chapter will be confined to a few propositions, relating specially to evidence of title to an office, as distinguished from the general law of evidence.

§ 298. **Commission not appointment, but evidence; cases where void.**—A commission is not an officer's appointment, but the evidence of the appointment;³ and it has been said, that where the title to an office is derived from an executive appointment, the commission is the only legal evidence thereof.⁴ But, in another case, it was said that a commission, issued to a person thus appointed, is "but evidence of those acts of appointment and qualification, which constitute his title, and which may be proved by other evidence, where the rule of law requiring the best evidence does not prevent."⁵ Where the officer is chosen by the votes of the people, a commission issued by the governor is merely evidence of title, and confers no title to the office; it may be revoked by the governor, and a new commission may be issued to another, if the first commission was issued by mistake.⁶ Where the title to an office is derived from a popular election, *semble*, that the commission of the governor, although he is required by law to issue it, is not absolutely necessary to the right to exercise the duties of the office.⁷ A com-

¹ *Ante*, § 86.

² *Post*, ch. 27.

³ *Hill v State*, 1 Ala. 559;
Jeter v State, 1 McCord (S. C.) 233;
State v Lylies, 1 McCord (S. C.) 238.

⁴ *State v Allen*, 21 Ind. 516.

⁵ *United States v Le Baron*, 19 How. (U. S.) 73, per Curtis, J., p. 78.
See also *Allen v State*, 21 Ga. 217;

Carter v Sympton, 8 B. Mon. (Ky.) 155;
Bank of United States v Dandridge,
12 Wheat. (U. S.) 64;
Callison v Hedrick, 15 Gratt. (Va.)
244.

⁶ *State v Capers*, 37 La. Ann. 747.
See also *Gulick v New*, 14 Ind. 93.

⁷ *Glascok v Lyons*, 20 Ind. 1;
State v Allen, 21 Ind. 516;
Shannon v Baker, 33 Ind. 390.

mission or certificate of election is *prima facie* evidence of title to an office, and it entitles the person named therein to exercise the functions of the office, until a judicial determination to the contrary.¹ It was said, however, in one case, that the operative power of a commission is suspended, pending a contest respecting the officer's election; but where the decision is in his favor, it takes effect again, and a new commission is not necessary.² And where, pending a contest for an office, a commission is inadvertently issued to one of the claimants by the governor, it is not conclusive upon a *quo warranto*.³ A commission issued by the governor, upon an erroneous supposition that the office was vacant, confers no title upon the person named therein.⁴ So where the general assembly assumed to choose a person to fill a vacancy, which the constitution declared should be filled by the governor; and, upon a certificate of such appointment, the governor issued, to the person so chosen, a commission, reciting that he was commissioned as the elect of the general assembly; it was held that this was not an appointment by the governor, and the person named was not entitled to the office.⁵ Other authorities, relating to the effect of a commission or certificate of election, will be found in subsequent portions of this work.⁶

§ 299. **Special case, where two held commissions.**—In a case which arose in Louisiana, upon a contest for the office of sheriff, the relator insisted that the defendant was appointed to the office by the governor on the 9th of March, 1869, while the senate was not in session, the legislative session having adjourned nine days previously; that under the constitution and laws of the state, an

¹ *State v Johnson*, 17 Ark. 407;

Ewing v Filley, 43 Pa. St. 384;

Kerr v Trego, 47 Pa. St. 292.

See also *Low v Towns*, 8 Ga. 360.

² *Luzerne Co. v Trimmer*, 95 Pa. St. 97.

³ *Hardin v Colquitt*, 63 Ga. 588.

⁴ *State v McNeely*, 24 La. Ann. 19.

⁵ *State v Peelle*, 124 Ind. 515.

⁶ *Post*, § 313, and cases in ch. 18.

office thus filled became vacant, at the end of the next session of the legislature, about March 1, 1870; and that, inasmuch as he was appointed on the 16th day of that month, during an extra session of the legislature, and was then confirmed by the legislature, he was entitled to the office. But the defendant's commission recited, that his appointment was made by and with the advice and consent of the senate. The court said: "There is no difference between the commissions, except in their dates and the names of the appointees. Both commissions recite that the appointments were made, by and with the advice and consent of the senate. There is no evidence, *dehors* the commissions, contradicting their recitals, and we are not authorized to take judicial cognizance, without proof, of the legislative transactions recorded in its journals, in order to ascertain the truth of the fact, as to whether confirmations were made by the senate, of the persons purporting by these commissions to have been appointed. In the entire absence of any thing, showing that there has been a removal from office of the party first appointed, or that the office had, from any cause, become vacated before the date of the last commission, we can only presume the last commission was issued in error, and must therefore maintain the defendant in the right he sets up to the office, in virtue of his holding the older commission." ¹

§ 300. **Proof that act is official; other instances.**—Proof that a particular act was official may be made, by showing that the party exercised the office, before or at the time in question, or within a reasonable time afterwards.² A public officer, who has acted as such, without

¹ *State v Bankston*, 23 La. Ann. 375.
S. P., *Ewing v Thompson*, 43 Pa. St. 372.

² *Doe d. Hopley v Young*, 8 Q. B. (Ad. & El.) 63; 15 L. J., Q. B., 9; 9 Jur. 941;

Doe d. Bowley v Barnes, 8 Q. B. (Ad. & El.) 1037;

Reg. v Murphy, 8 C. & P. 297;

See also, *McMahon v Lennard*, 6 H. L. Cas. 970.

objection from the public or the appointing power, is presumed, until the contrary appears, to have been duly appointed,¹ and to have duly filed his official bond, and taken his official oath.² Such proof, until it is overcome by contrary evidence, enables him to justify, in a case where he is obliged to prove that he is an officer *de jure*, this being one of the exceptions to the rule that the best evidence must be adduced.³ But where one claims title to a city office, under an appointment from the president of the council, acting as mayor, the facts must be shown, which confer upon the president the right to make the appointment.⁴

§ 301. **Upon indictment for assaulting officer in discharge of duty, de facto proof suffices.**—Upon the trial of an indictment for assaulting a police officer in the discharge of his duty, proof that he was acting as such officer at the time of the assault, and that he had so acted for four years previously, is sufficient to show that he was such officer.⁵ And proof that he then wore the uniform and badge of a police officer is sufficient to charge the defendant with notice that he was such an officer.⁶

§ 302. **Proof of exercise of foreign office sufficient.**—No different proof of the official character of a foreign officer is required, from that required with respect to an officer at home; in either case, proof that he actually exercised the office is usually sufficient.⁷

¹ Callison v Hedrick, 15 Gratt. (Va.) 244.

² People v Clingan, 5 Cala. 389.

³ Colton v Beardsley, 38 Barb. (N. Y.) 29.

See also, Berryman v Wise, 4 T. R. (D. & E.) 366;

Bryan v Walton, 14 Ga. 185;

Allen v State, 21 Ga. 217;

State v Ferguson, 31 N. J. L. 107;

Potter v Luther, 3 Johns. (N. Y.) 431;

Wilcox v Smith, 5 Wend. (N. Y.) 231;

McCoy v Curtice, 9 Wend. (N. Y.) 17;

United States v Reyburn, 6 Pet. (U. S.) 352.

⁴ State v Board of Health, 49 N. J. L. 349.

⁵ Comm. v Kane, 108 Mass. 423.

⁶ Comm. v Tobin, 108 Mass. 426.

⁷ Spaulding v Vincent, 24 Vt. 501.

BOOK III

TENURE OF OFFICE. VACANCY

CHAPTER XIV

TERM OF OFFICE

CONTENTS

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304. If no term fixed by law, officer holds at pleasure of appointing power; effect of change in, or abolition of, appointing power; or repeal of act creating office.
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306. Effect, upon an office held at pleasure, of general statute fixing all officers' terms.
307. Statute allowing city council to regulate, etc., authorizes it to fix term; when mayor, elected under amendment of city charter, begins to hold.
308. General rule, that statute to be construed so as to avoid vacancies; but construction favored, which limits a term to shortest time; various instances of construction of statutes fixing official terms.
309. Construction of constitutional provision forbidding judicial officers to hold after 70 years of age.
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311. Where constitution requires officers to be elected, legislature cannot change incumbents' terms; a statute may be unconstitutional as to limitation of term, but valid as to election.

- SEC. 312. Where officer reelected dies before commencement of new term, person appointed to fill vacancy holds till another elected, etc., and new appointment at commencement of new term void; where officer is commissioned for less than his lawful term, he holds for full term.
313. Commission or certificate of election not required to state length of term, and is not conclusive if length is stated.
314. When term begins, if time not fixed by statute; various rulings.
315. Where statute limiting term is extended, term is extended; where statute creating office is repealed, etc., office abolished.
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318. Officer appointed by governor, during recess of senate, and afterwards confirmed by senate, holds from the original appointment; the beginning of the first officer's term fixes that of his successor's.
319. Whether, in absence of special provision, an officer appointed to fill a vacancy holds for a full term, or for unexpired portion of original term.
320. The same subject; cases holding that he holds for a full term, and cases holding otherwise.
321. Where governor appoints, during recess of senate, he cannot make a new appointment, until senate has acted upon the first.
322. Where term is six years, and no appointment made during first two years, person appointed holds for four years; secretary of state, acting as governor during a vacancy, holds till vacancy filled, although his own term expires earlier.

§ 303. **Meaning of "term;" when officer has no term.**—The word "term" is uniformly used to designate a fixed and definite period of time. And where the constitution of a state provides, that officers of cities and towns "shall

be elected for such terms and in such manner, as may be prescribed by law," a statute which creates a police board for a city, and provides that the members thereof "may be removed at the pleasure of the chancellor, and must be removed, whenever, by a change of political opinion, on their part, or on the part of the mayor, they cease to disagree". . . . fails to comply with the provisions of the constitution, because it provides for a tenure of office, unknown to that instrument, and opposed, not only to its letter, but to its spirit and policy."¹ And an officer, who holds his office at the pleasure of another officer or board of officers, has no official term, within the meaning of a constitutional or statutory provision relating to such terms.²

§ 304. **If term not fixed, officer holds at pleasure of appointing power; effect of change, etc., in appointing power.**—Where an office is filled by appointment, and a definite term of office is not fixed by a constitutional or statutory provision, the office is held at the pleasure of the appointing power, and the incumbent may be removed at any time.³ Where a board of officers has the power to appoint certain officers, to hold during the pleasure of the board, it has been held that the tenure of the offices is not affected by changes in the membership of the appointing board.⁴ In the same case, it was said, that if the board is abolished by law, the tenure of the office is thereby determined.⁵

¹ *Speed v Crawford*, 3 Met. (Ky.) 207.

² *Id.*; *Gibbs v Morgan*, 39 N. J. Eq. 126.

³ *State v Alt*, 26 Mo. App. 673;
People v Comptroller, 20 Wend. (N. Y.) 595;
Comm. v Sutherland, 3 S. & R. (Pa.) 145;
Field v Girard College, 54 Pa. St. 233;
Williams v Boughner, 6 Coldw. (Tenn.) 486.

See also, *Story Const.*, 4th ed., § 1537;
Patton v Vaughan, 39 Ark. 211;
People v Hill, 7 Cal. 97;
State v Doherty, 25 La. Ann. 119;
State v Police Com'rs, 88 Mo. 144;
People v Whitlock, 92 N. Y. 191; and
post, §§ 354 *et seq.*

⁴ *State v Board of Public Lands*, 7 Nebr. 42.

⁵ *Id.* See also *Nichols v Comptroller*, 4 Stew. & P. (Ala.) 154.

But, in another case, where a board of police commissioners was created by statute for the city of San Francisco, and the district courts were directed to appoint the commissioners, but no term of office was fixed; and the district courts appointed the defendant one of such commissioners, who entered upon the office; and subsequently the district courts were abolished by statute, without any provision for the appointment or removal of police commissioners; whereupon, six years after the respondent's appointment, the governor appointed the relator in his place; it was held that the relator was not entitled to the office, as the governor was empowered only to fill vacancies, and there was no vacancy in the office.¹ But a deputation expires with the office on which it depends, and if the principal is reappointed the deputy must be reappointed also.² The repeal of a statute or an ordinance creating an office, abolishes the office.³ The term of an officer appointed to hold "during the pleasure of the governor for the time being," does not expire with the term of the governor who appointed him.⁴

§ 305. **Legislature no power to alter fixed term; where not fixed, may alter.**—Where the constitution fixes the term of an office, the legislature has no power to lengthen it or shorten it, directly or indirectly, by statute, or to enact a statute which would create a vacancy.⁵

¹ *People v Hammond*, 66 Cal. 654.
See also *Currier v Boston, etc., Railroad Company*, 31 N. H. 209.

² *Banner v McMurray*, 1 Dev. L. (N. C.) 218.
See also *post*, § 582.

³ *Chandler v Lawrence*, 128 Mass. 213.

⁴ *Kaufman v Stone*, 25 Ark. 336.

⁵ *People v Dubois*, 23 Ill. 547;
Governor v Nelson, 6 Ind. 496;
Howard v State, 10 Ind. 99;
Deweese v State, 10 Ind. 343;

Douglass v State, 31 Ind. 429;
Griebel v State, 111 Ind. 369;
Pursell v State, 111 Ind. 519;
State v Thoman, 10 Kan. 191;
Lowe v Comm., 3 Met. (Ky.) 237;
State v Wiltz, 11 La. Ann. 439;
Fant v Gibbs, 54 Miss. 396;
State v Draper, 50 Mo. 353, cited *post*, § 426.
State v Brewster, 44 Ohio St. 589;
Comm. v Gamble, 62 Pa. St. 343;
State v Messmore, 14 Wis. 163.
See also, *ante*, ch. 2.

Thus a statute is unconstitutional, which advances the beginning of the term, leaving the time of its ending unchanged.¹ But where the term is not fixed by the constitution, the legislature may alter it at pleasure.² Where the constitution fixes a maximum only, for the duration of a term of an officer, elected by the people, the legislature may extend the term of an incumbent of the office, provided the entire term, as thus extended, does not exceed the constitutional limit; and the incumbent will hold, during the additional period, as an elected officer, not as an officer appointed by the legislature.³ And where the constitution fixes the duration of the term, but not its beginning, the legislature may fix the beginning.⁴ It has been held that a constitutional provision, forbidding the extension of any officer's term, for a longer period than that for which he was elected or appointed, does not prevent the legislature from changing the time for an election, although the statute for that purpose incidentally extends the officer's term; because the object of the constitutional prohibition was to prevent special legislation in favor of particular officers, not to control the general power of the legislature to regulate elections.⁵

§ 306. **Effect of general statute upon office held at pleasure.**—Where it was provided by law, that the clerk of the chancellor should hold his office at pleasure, and a subsequent statute enacted that the terms “of all officers not otherwise fixed” should be fixed at four years; it was held that this fixed the term of that officer at four years from the time of his appointment.⁶

¹ *Howard v State*, 10 Ind. 99.

² *In re Bulger*, 45 Cal. 553;
Taft v Adams, 3 Gray (Mass.) 126;
Chandler v Lawrence, 128 Mass. 213;
In re Jordan, 37 Minn. 174;
Wilcox v Rodman, 46 Mo. 322.
See also, *ante*, §§ 19, 20.

³ *Christy v Supervisors*, 39 Cal. 3.
See also *People v Hastings*, 29 Cal. 449;
People v Kelsey, 34 Cal. 470.

⁴ *People v Rosborough*, 14 Cal. 181.

⁵ *State v McGovney*, 92 Mo. 423.
See also, *State v Ranson*, 73 Mo. 78.

⁶ *Hughes v Buckingham*, 13 Miss. 632.

§ 307. **City council to regulate, etc.; when mayor begins to hold.**—Where a statute authorizes a city council to regulate the “manner of appointment and removal” of the city officers, this authorizes the council to fix the terms of their respective offices; and the council may thus fix the terms, by providing that the offices shall be held during good behavior.¹ Where an act, amending a city charter, provided for the election of a mayor, two years before the expiration of the term of the mayor in office, but did not specify any time for the beginning of the new mayor’s term; it was held that the new mayor was entitled to immediate possession of the office.²

§ 308. **General rule to avoid vacancies; construction favored which limits term.**—“The law abhors vacancies in public offices, and great precautions are taken to guard against their occurrence. The policy of the law is to have some one always in place, to discharge the duties of public offices; and, in a doubtful case, the construction of a law fixing the tenure of an office would be greatly influenced by that consideration; but where . . . there is a *casus omissus*, resulting from giving the language of the law the only construction of which it is fairly susceptible, the courts must leave it to the law-making power to make provisions to avoid such a consequence.”³ But, other considerations being equal, that construction of a doubtful provision of a statute or a constitution will be followed, which limits the term of the office to the shortest time.⁴ Where the constitution provided, that if the office of a judge should become vacant, the vacancy should be filled by the governor, until a successor should be elected and should qualify;

¹ State v Trenton, 50 N. J. L. 331.

² State v Seay, 64 Mo. 89, per Henry, J., p. 105.

³ Alexander v McKenzie, 2 S. C. 81.

⁴ Wright v Adams, 45 Tex. 134.

and that such successor should be elected at the first annual election, occurring more than thirty days after the happening of the vacancy; it was held, that although a judge could not be elected for the unexpired term, at an annual election held within the thirty days, he might be then elected for the succeeding term.¹ A constitutional provision that a person, appointed to fill a vacancy, shall hold "until the next regular election," means until the next election for that office.²

§ 309. **Provision forbidding judicial officer to hold after 70 years of age.**—Where a provision of a state constitution declared, that "no person shall hold the office of justice or judge of any court, longer than until and including the last day of December after he shall be seventy years of age;" it was held, that the words "justice or judge of any court" were to be construed in their popular sense, and not as including every officer whose functions were of a judicial character; and consequently that the restriction did not apply to a surrogate, or to a justice of the peace.³ And, under a similar provision, the like ruling was made respecting county commissioners.⁴

§ 310. **Whether statutes create permanent or temporary offices.**—Where a statute, passed in 1871, authorized the election of a certain officer for a term of five years; and another statute, passed in 1877, authorized "a second election" for the same officer for the term of five years; it was held that the office expired in 1882, and that no further election was to be held therefor.⁵ And where an appropriation act authorized the secretary of the treasury of the United States, to appoint assistant agents

¹ *State v Black*, 22 Minn. 336.

² *People v Wilson*, 72 N. C. 155.

³ *People v Mann*, 97 N. Y. 530, rev'g 32 Hun (N. Y.) 440;
People v Carr, 100 N. Y. 236.

See also *Settle v Van Evrea*, 49 N. Y. 280.

⁴ *Betts v New Hartford*, 25 Conn. 180.

⁵ *State v Brown*, 38 Ohio St. 344.

See also *Bergen v Powell*, 94 N. Y. 591.

at a certain place, and made an appropriation to pay them; it was held that the office expired with the expenditure of the appropriation, and could not be prolonged by the continued discharge of the duties by the agents.¹ But a statute, directing the appointment of a city officer, "to continue in office two years," creates a permanent office, with a term of two years, and requires the appointment of a person for another term, when the first term expires.² Where a statute provided for the appointment of seven commissioners, to hold for one, two, three, four, five, six, and seven years, as determined by lot, and authorized the governor to fill vacancies; it was held that the successor of each of the first appointed commissioners held for seven years.³

§ 311. **Legislature cannot change constitutional requirements regarding terms.**—Where a provision of a state constitution declares, that town officers must be elected by the electors, or appointed by the local authorities of the town, as the legislature shall prescribe; it was held that a statute, extending the terms of the incumbents of certain town offices, was virtually an attempt by the legislature to exercise the power of appointment; and that such a statute was therefore in conflict with the constitution; although the legislature had the power to extend the terms of office of those who should thereafter be elected; and consequently that an act, extending the terms of office of certain town officers one year, applied exclusively to the successors of those then in office; so that a person elected at a town meeting, held just before the expiration of the original term of an incumbent, who was in office when the statute was enacted, was entitled

¹ *Beaman v United States*, 19 Ct. of Cl. (U. S.) 5.

See also *post*, § 461.

² *People v Addison*, 10 Cal. 1.

S. P., *State v Percy*, 44 Mo. 159;

Buffalo v Mackay, 15 Hun (N. Y.) 204.

³ *Holden v People* 90 Ill. 434.

to the office.¹ Where the constitution fixes the term of an office at four years, an act of the legislature, providing for an election to fill the office, and limiting the term of the officer to be elected to two years, is void as to the limitation, but constitutional and valid as to the residue; and the person so elected holds for four years.²

§ 312. Where officer elected dies before new term, person appointed holds till another elected; new appointments, etc., void.—Where the constitution of a state provided for the election of a judge of probate, and that he should hold his office for four years, and until a successor should be elected and qualified; and that, in case of a vacancy, the governor should appoint a person to hold, until a successor should be elected and qualified; and a judge of probate, having been reelected, died before the commencement of his new term; whereupon the governor appointed a person to fill the vacancy; and on January 1, when the new term would have commenced, the governor, supposing that there was a vacancy, made a new appointment; it was held that the second appointment was void, and the person first appointed would hold until another judge was elected and qualified; and that it made no difference that the commission, issued to the person first appointed, recited that the office was to be held until the governor should revoke the commission, as such a limitation was inoperative.³ And where the charter of a city provided for the appointment by the common council of a marshal for the city, and fixed his term of office at two years; and a person was appointed by a resolution of the common council, purporting to confer the office for one year; and he gave an official bond, reciting his appointment for that time; it was held

¹ *People v McKinney*, 52 N. Y. 374, approving *People v Bull*, 46 N. Y. 57, and overruling *People v Batchelor*,

22 N. Y. 128.

² *People v Rosborough*, 14 Cal. 180.

³ *People v Lord*, 9 Mich. 227.

that he was entitled to hold the office for two years, that the limitation in the resolution was void, and the recital in the bond was surplusage, and the bond was valid for the full term.¹ So, where a city officer's term, as fixed by statute, is two years, but the common council has been accustomed to appoint the officer annually, a person appointed to the office is entitled to hold for two years, although, at the end of his first year, he unsuccessfully applied for a reelection.²

§ 313. **Commission or certificate of election not conclusive as to length of term.**—In the last preceding chapter, the effect of a commission or certificate of election was considered.³ As stated in some of the cases there cited, the commission or certificate of election of an officer does not control, with respect to the duration of his term of office. Other cases declare the same principle, namely, that a commission or certificate of election is not conclusive, with respect to the duration of the term; that the facts upon which that question depends may be always proved; and that they will fix the duration, even though the result is contrary to the terms of the instrument.⁴ So a commission is not void, because it does not state the term for which the officer is appointed; that may be shown by extrinsic evidence, as by proof that the office was vacant for a particular year.⁵ And where the constitution confers upon the governor the power to appoint, only until the end of the next session of the legislature; and he makes an appointment purporting to be for a full term; it is in legal effect only an appointment until the end of

¹ *Stadler v Detroit*, 13 Mich. 346.

² *State v Brady*, 42 Ohio St. 504.

³ *Ante*, §§ 298, 299.

⁴ *Brower v O'Brien*, 2 Ind. 423;
Hench v State, 72 Ind. 297;

State v Chapin, 110 Ind. 272;

Hale v Evans, 12 Kan. 562;

State v Taylor, 15 Ohio St. 137;

See also, *Bland & G. County Judge Case*, 33 Gratt. (Va.) 443.

⁵ *State v Fulkerson*, 10 Mo. 681.

the next session; but an officer so appointed holds over until his successor is appointed.¹

§ 314. **When term begins, if time not fixed; various rulings.**—It was held, by the supreme court of New Jersey, that where an office is filled by appointment, and the beginning of the official term is not otherwise fixed by law, the term begins as soon as the person appointed is authorized by his own action to legally assume the duties of the office, not merely when he enters upon the office.² The decision in this cause was affirmed by the court of errors and appeals; but the rule laid down in the latter court was, that in such a case, the term begins at the time of the appointment; and that this is the rule, although the statute provides that the officer shall not draw any salary, or discharge any duties, except from the time when he qualifies, and that his predecessor shall hold over until he qualifies.³ Where an office is filled by popular election, and the beginning of the term is not fixed by law, the person elected may enter upon it at any time, upon receiving the certificate of election and qualifying.⁴ Other cases hold that the term begins to run from the time of the election;⁵ and that the person thus elected is entitled to the office, without any commission, from the commencement of the term; and if, after a contest for the office, a commission is issued to him, it commences to run from the time of the election.⁶ Where a statute relating to a public office does not fix the beginning of the term, but requires the governor to issue a commission to the person elected, without specifying

¹ *People v Tyrrell*, 87 Cala. 475.

² *State v Love*, 39 N. J. L. 14.

³ *Atty. Gen'l v Love*, 39 N. J. L. 476, approving dictum in *Marbury v Madison*, 1 Cranch (U. S.) 137, and disproving *Brodie v Campbell*, 17 Cala. 11.

See also, *Alexander v McKenzie*, 2 S. C. 81, cited *ante*, § 307.

⁴ *McGee v Gill*, 79 Ky. 106.

⁵ *State v Constable*, 7 Ohio 7.
See also *Marshall v Harwood*, 5 Md. 423;
Hughes v Buckingham, 13 Miss. 632;

⁶ *Shannon v Baker*, 33 Ind. 390.

the time when it is to issue, it will be presumed that the commission was issued within a reasonable time; and if the statute requires that the oath of office should be indorsed upon the commission, the courts will look to the time when the oath was taken, to determine the beginning of the term.¹ A constitutional provision, requiring an official term to be computed from the first of September, applies to one appointed to fill an unexpired term.²

§ 315. **Where statute limiting term is extended, term extended; office abolished, where statute creating it is repealed.**—Where a statute creating an office limits the term thereof to two years, and that statute is, by another statute, continued longer in force, the officer holds as long as the original statute is continued.³ Upon the creation of a new judicial circuit, the office of the judge of the circuit becomes *ipso facto* vacant, and his term expires upon the election and qualification of the new judge.⁴ And upon the repeal of a municipal charter, or the substitution for it of another charter, all the offices held under the old charter are abolished.⁵ And an office is abolished by implication, where a statute transfers all its functions to another officer.⁶

§ 316. **Elective term, expiring before election, term extends to election; office held under military authority.**—Where a statute, organizing a new county, provides that the county officers first elected shall hold for two years, and no provision is made for the terms of those subsequently elected, but the general statutes provide that county officers shall hold for two years; it will be intended that the first officers hold until the first general election for county officers, after the expiration of the two years, and

¹ Brodie v Campbell, 17 Cal. 11.

² Tatum v Rivers, 7 Baxter (Tenn.) 295.

³ Bruce v Fox, 1 Dana (Ky.) 447.

⁴ State v Askew, 48 Ark. 82.

⁵ Crook v People, 106 Ill. 237.

See also McGrath v Chicago, 24 Ill. App. 19.

⁶ People v Henshaw, 76 Cal. 436.

that afterwards their successors hold for two years; and an earlier election will be void.¹ Where, during the civil war, and while the state of Tennessee was occupied and administered by the military authority, an officer was elected under such authority, it was held that he was not entitled to hold for a full term, against a person elected to the same office under the state laws, and after the civil authority was restored.²

§ 317. **Effect of word "from" in commission.**—An officer, commissioned to hold office "during the term of four years from the 2d day of March, 1845," is in office on the 2d day of March, 1849, and his official act on that day is valid. "The word 'from' always excludes the day of date."³

§ 318. **Holding from original appointment.**—It has been held, that where an officer is appointed by the governor during the recess of the senate, and afterwards confirmed by the senate, his term begins from his original appointment, and not from the confirmation, although a new commission was issued thereupon.⁴ Where a statute creates an office, and fixes the term at two years, and until a successor is chosen and qualified, the time of the beginning of the term of the officer first chosen determines the beginning of all subsequent terms.⁵

§ 319. **Officer chosen to fill vacancy.**—The authorities are not entirely harmonious respecting the duration of the term of an officer, elected by the people, or appointed by the governor, or some other officer or a board of officers, to fill a vacancy, where the constitution or the statute has failed to specify the duration of his

¹ *People v Church*, 6 Cala. 76.

² *Isbell v Farris*, 5 Coldw. (Tenn.) 426.

³ *Best v Polk*, 18 Wall. (U. S.) 112.

⁴ *Shepherd v Haralson*, 16 La. Ann. 134.

See also *Dyer v Bayne*, 54 Md. 87, and *post*, ch. 18.

⁵ *State v Stonestreet*, 99 Mo. 361.

term, or where a provision upon that subject is of doubtful construction. But the weight of the authorities is decidedly in favor of the proposition that a person so chosen holds for a full term, and not merely for the unexpired portion of his predecessor's term.

§ 320. **The same subject; different rulings.**—Where the constitution provides for the election of sheriffs “once in every three years, and as often as vacancies shall happen;” and that the governor may remove them “at any time within the three years for which they shall be elected;” it was held that the defendant, who was elected in 1826, to fill a vacancy occasioned by his predecessor's death, held for three years; and the election of the relator, as sheriff, at the general election of 1828, under the general election laws of the state, was void. Marcy J., delivering the opinion of the court, said that the defendant was elected “to fill the vacant office, and not merely to serve out the vacant term of his predecessor. I am inclined to think,” he continued, “that a diversity of opinion on this subject has arisen, from different applications of the term ‘vacancies,’ in the section of the constitution which we are now considering. It has been sometimes applied to the office, as contradistinguished from the term of service, and at others to the term of the office. I understand it as applicable to the office alone.”¹ The same principle was applied to an officer elected to fill a vacancy in the office of surrogate, where the language of the constitution was substantially the same as in the case last cited, although, in many of the counties of the state, the offices of county judge and of surrogate were united in one person, and the constitution prevented a county judge, but not a surrogate, from holding office after he attained seventy years

¹ *People v Green*, 2 Wead. (N. Y.) 263.

S. P., Attorney-General v Brunst, 3 Wis. 737.

of age; and it was further held, that the legislature might constitutionally provide, that the person so elected should enter upon the duties of his office immediately, although his constitutional term did not begin to run till the first of January following.¹ The same general principle, that, in the absence of any constitutional or statutory provision to the contrary, an officer elected to fill a vacancy, holds for a full term, has been recognized in several other cases.² And where an officer, elected to fill a vacancy, is reëlected to the same office, pending the running of the full term, his reëlection does not justify him in holding for any longer time, but it is void.³ The cases are not harmonious on the question, whether, in the absence of any constitutional or statutory provision, fixing the term of a person appointed to fill a vacancy, he holds for a full term, or only until the expiration of his predecessor's term.⁴

§ 321. Where governor appoints, and senate confirms.—Under a provision of the constitution of California, conferring upon the governor power to fill a vacancy, by

¹ *People v Townsend*, 102 N. Y. 430, rev'g 40 Hun (N. Y.) 360.

² *People v Burbank*, 12 Cal. 378;
Sansbury v Middleton, 11 Md. 296;
Crowell v Lambert, 9 Minn. 283;
People v Coutant, 11 Wend. (N. Y.) 132; *id.* 511;

Keys v Mason, 3 Sneed (Tenn.) 6;
Banton v Wilson, 4 Tex. 400;
Meredith's case, 33 Gratt. (Va.) 119.
The same rule has been declared in some cases, where the vacancy was filled by the legislature.

Marshall v Harwood, 5 Md. 423;

Whipper v Reed, 9 S. C. 5;

✓ *Contra*, *Baker v Kirk*, 33 Ind. 517.

See also, the following cases, which appear, however, to have been determined under a special constitutional or statutory provision.

State v Mayor, etc., 28 Ind. 248;

Parmater v State, 102 Ind. 90;

Scarff v Foster, 15 Ohio St. 137;

Op'n of the Just., 50 Me. 607.

³ *People v Coutant*, 11 Wend. (N. Y.) 132; *s. c.*, *aff'd on error*, 11 Wend. (N. Y.) 511.

⁴ *Brower v O'Brien*, 2 Ind. 423;

Leeman v Hinton, 1 Duv. (Ky.) 37;

Stevens v Wyatt, 16 B. Mon. (Ky.) 512;

Hughes v Buckingham, 13 Miss. 632;

People v Breen, 53 N. Y. Super. Ct. 167;

State v Hutson, 1 McCord (S. C.) 240;

State v McClintock, 1 McCord (S. C.) 245.

See also, *Parcel v State*, 110 Ind. 122;

Op'n of the Just., 64 Me. 596;

State v Seay, 64 Mo. 89;

People v Wilson, 72 N. C. 155.

granting a commission, which shall expire at the end of the next session of the legislature, or at the next election by the people; it was held, that where, during a recess of the legislature, the term of the incumbent of an office, to be filled by the appointment of the governor, with the advice and consent of the senate, expires, the appointment by the governor, during the recess, of a successor, is not an appointment to fill a vacancy, and vests in him the right to hold the office for the full term, subject to be defeated by the refusal of the senate to concur; and that a new appointment by the governor, with the advice and consent of the senate, before action of the senate upon the first appointment, is void.¹ In Tennessee, it was held, that where the constitution fixes the term of an officer at eight years, and requires that he shall be elected by the people; an appointment by the governor to fill a vacancy does not confer the right to hold for a full term, but only for the unexpired portion of the predecessor's term.² Other rulings as to the cases where a vacancy may be filled and the effect of an appointment to fill a vacancy, are considered in a subsequent chapter.³

§ 322. **When person appointed during term holds for unexpired portion.**—Where the charter of New York city provided that every head of a department and commissioner “shall hold his office for the term of six years, and in each case until a person is appointed in his place;” and that “any person who may be appointed to fill any such vacancy shall hold his office for the unexpired term of his predecessor;” it was held, that the latter clause applied only to vacancies, other than those arising from the expiration of terms; that the intent of the statute was to designate consecutive periods of six years, following

¹ *People v Mizner*, 7 Cal. 519; approved and followed, *People v Addison*, 10 Cal. 1.

² *Barry v Lauck*, 5 Coldw. (Tenn.) 588.

³ *Post*, ch. 18.

each other in regular order, the one beginning where the other ends; that a person, appointed at any time during one of the periods of six years, was an incumbent of the period to which his appointment related, whose term of office expired with the expiration of his period; and, consequently, that where the term of a police commissioner expired on the 30th of April, 1878, and his successor was not appointed until the 15th of May, 1880, the term of the latter ended on the 30th of April, 1884.¹ Where the constitution of a state provides, that in case of vacancy in the office of governor, the secretary of state shall discharge the duties of that office, a secretary of state, thus acting as governor, does not cease to act until the vacancy is filled, although his term as secretary of state expires earlier.²

¹ *People v McClave*, 99 N. Y. 83.

² *Chadwick v Earhart*, 11 Oreg. 389.

CHAPTER XV

HOLDING OVER; POWERS AFTER EXPIRATION OF TERM

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§ 323. **Whether at common law officer holds over ; weight of modern authority.**—With respect to most public offices, it is expressly declared in this country, by constitutional or statutory provision, that the incumbent shall hold over, beyond his fixed official term, until his successor shall be chosen and shall qualify. There is highly respectable authority for the proposition, that, in the absence of such express provision, a public officer, whose term has expired, does not hold over.¹ But the weight of authority is in favor of the contrary rule, which is founded upon obvious considerations of public convenience, to wit, that at common law a public officer holds over, after the expiration of his term, until the choice and qualification of his successor, with the exception of a member of the legislature, and possibly a judicial officer, those exceptions being recognized in some of the cases.

§ 324. **English cases upon this question.**—We find but few cases on this question in the English reports. In one, it was decided in the exchequer chamber and afterwards in the house of lords. that although the aldermen of Truro were to be *annuatim eligend.*, these words were only directory, and the aldermen were good

¹ Paine on Elections, § 224, citing *Christian v Gibbs*, 53 Miss. 314;

People v Tieman, 8 Abb. Pr. (N. Y.) 359; s. c., 30 Barb. (N. Y.) 193.

See also *Philips v Wickham*, 1 Paige (N. Y.) 590, per Walworth, Chr., p. 595;

People v Bull, 46 N. Y. 57, per Folger, J., pp. 65-67

officers after the year, and until others were elected.¹ In another case, it was said by the K. B., that although a town clerk is to be *annuatim eligibilis*, he continues to be town clerk after the year, until another is chosen; but if he had been *eligibilis pro uno anno tantum*, his office would have expired at the end of the year.²

§ 325. American cases establish that officer holds over until successor qualifies; appointed and elected officers.—The question, whether a public officer holds over, in the absence of any constitutional or statutory provision to that effect, until the choice and qualification of his successor, was fully examined by the supreme court of California, in an opinion citing and commenting upon the authorities on both sides; and the conclusion reached was, that whatever may be the rule, with respect to members of the legislature and judicial officers, all civil officers, whose duties consist in the safekeeping and current management of public property, hold over until the choice and qualification of their successors respectively, without any constitutional or statutory provision to that effect.³ The exceptions suggested in that case seem, especially with respect to members of the legislature, to be consonant to sound public policy and general usage; but in several other American cases, the doctrine is stated or recognized, without exception or qualification.⁴ But

¹ Foot v Prowse, Str. 625; 2 Bro. P. C. 289.

² Reg. v Corporation of Durham, 10 Mod. 146.

See also Anon, 12 Mod. 256.

³ People v Oulton, 28 Cal. 44.

⁴ People v Tilton, 37 Cal. 614;
People v Reid, 11 Colo. 138;
Moser v Shamleffer, 39 Kan. 635;
Wier v Bush, 4 Litt. (Ky.) 429;
People v Fairbury, 51 Ill. 149;
Stewart v State, 4 Ind. 396;
State v Harrison, 113 Ind. 434;
Thomas v Owens, 4 Md. 189;

Marshall v Harwood, 5 Md. 423;
Sansbury v Middleton, 11 Md. 296;
Robb v Carter, 65 Md. 321;
School Dist. v Atherton, 12 Met. (Mass.) 105;
Dow v Bullock, 13 Gray (Mass.) 136;
Cordell v Frizell, 1 Neva. 130;
State v Wells, 8 Neva. 105;
People v Ferris, 16 Hun (N. Y.) 219;
Kreidler v State, 24 Ohio St. 22;
Chandler v Bradish, 23 Vt. 416;
Ex parte Lawhorne, 18 Gratt. (Va.) 85;
Wheeling v Black, 25 W. Va. 286.

it was said, in a case in the court of appeals of New York, that under a provision of the statute of that state, that every officer "duly appointed" (with the exception of certain judicial officers, specified in the statute,) shall continue to discharge the duties of his office, "until a successor in such office shall be duly qualified;" the doctrine that an officer may hold over does not apply to an officer elected by the people.¹ And *e converso* it has been held, that where a statute provides that an officer shall hold until his successor shall be "elected" and shall qualify, the term is not determined by the appointment of his successor.²

§ 326. **Power of legislature where constitution limits term.**—It was held in one case, that where the constitution affixes a specific term to an office, without any provision for holding over, the legislature cannot constitutionally provide by statute, that the officer shall hold over till his successor qualifies.³ But where the constitution provides for the creation of an office by the legislature, and the legislature creates the office, to be filled by the governor, with a provision that the officer shall hold for four years, the person appointed holds over until his successor is qualified.⁴ The doctrine that an officer holds over is inapplicable to a case, where his successor cannot be chosen, *ex. gr.*; to an officer of a municipal corporation which has been dissolved.⁵

¹ *People v Bull*, 46 N. Y. 57, criticising *People v Oulton*, 28 Cal. 44. See per Folger, J., pp. 65-67. The learned judge expresses a doubt whether the authorities "go further, than that one holding an office, the incumbent of which is, by its tenure, to be annually or periodically appointed or elected, and with no restrictive provision as to the term, may hold

over as stated." Accord, as to the effect of a similar statute, *Saunders v Grand Rapids*, 46 Mich. 467.

² *People v Lord*, 9 Mich. 227.

³ *State v Brewster*, 44 Ohio St. 589.

⁴ *Walker v Ferrill*, 58 Ga. 512.

⁵ *Beckwith v Racine*, 7 Biss. (U. S.) 142. *S. P.*, *Barkley v Levee Commissioners*, 93 U. S. 258.

§ 327. **Effect of forfeiture; of resignation; conflict of cases.**—An officer holds over, only where he has served to the end of his term, not where he has been adjudged to have forfeited his office; for such a judgment produces an immediate vacancy.¹ So it has been held, that an officer, who has resigned or has been removed, does not hold over, for the same reason, namely, that the office becomes vacant by the resignation or removal.² But the rule has been stated differently in other cases. Thus, in the supreme court of Illinois, it was said: “No distinction in this respect is to be drawn between a resignation, and the expiration of the time fixed for the holding of the office. A resignation ends the term of office, the same as the expiration of the time of the tenure of the office does, and no more effectually. The effect in either case is just the same. Whatever power there is in the latter case to act officially until the qualification of a successor, must exist equally in the case of a resignation. . . . When it is said in the statute that the resignation may be thus accepted, it is like to the expiration of the term of office. In form the office is thereby ended; but to make it effectual it must be followed by the qualification of a successor.”³ The solution of this question appears to depend upon that relating to the effect of a resignation, before the acceptance thereof, which will be considered in a subsequent chapter.⁴ A conditional resignation does not take effect, until the happening of the contingency specified. Therefore a decree, granted by a judge, after he has tendered a conditional resignation and before its acceptance, is valid.⁵

¹ *Hyde v State*, 52 Miss. 665.

² *Olmsted v Dennis*, 77 N. Y. 378;
State v Hawkins, 44 Ohio St. 98.

³ *People v Supervisor*, 100 Ill. 332, per
Sheldon, J., pp. 336, 337, following

and quoting from *Badger v United States*, 93 U. S. 599.

See also *Jones v Jefferson*, 66 Tex. 576.

⁴ *Post*, ch. 17.

⁵ *Northrop v Gregory*, 2 Abb. (U. S.) 503.

§ 328. **Holding over continues until successor qualifies lawfully.**—Where a statute provided that “town officers shall hold their offices for one year, and until others are chosen or appointed in their places, and have qualified,” and there was no statutory provision expressly requiring a town collector to take an oath of office; it was held that this provision implied that he should take such an oath, and that the incumbent of the office would hold over, until his successor had thus qualified.¹ Such a provision renders the qualification, as well the choice of a successor, necessary to divest the incumbent of the office, until which time his powers in the discharge thereof remain unimpaired.² Where an ordinance of a city directs the appointment of a fire engineer by the mayor, with the consent of the council, an appointment by the mayor, without such consent, does not divest an incumbent holding over after the expiration of his term.³ Where an appointment to fill a vacancy by the governor must be confirmed by the senate, a person appointed by the governor, during the recess of the senate, to fill a vacancy, holds until the senate confirms a new appointment.⁴ So where a constitutional amendment provides, that the existing officers shall hold, till new appointments are made under the new government, this means that the new appointments shall be made constitutionally; otherwise the incumbents continue to hold their offices.⁵

§ 329. **Effect of successor's death; holding over indefinite, if no restriction as to time.**—Under a constitutional or statutory provision, that an officer shall hold over, until his successor is chosen and qualifies, the right to hold over is determined by the election and qualification

¹ *People v McKinney*, 52 N. Y. 374.

State v Howe, 25 Ohio St. 588.

² *People v Supervisor*, 100 Ill. 332.

³ *State v Bryson*, 44 Ohio St. 457.

See also *State v Fagan*, 42 Conn. 32;

⁴ *People v Cazneau*, 20 Cal. 504.

Walker v Ferrill, 58 Ga. 512;

⁵ *State v Dubuc*, 9 La. Ann. 237.

State v Jarrett, 17 Md. 309;

See also *Watkins v Watkins*, 2 Md. 341.

of a successor, and the right does not survive, if the latter dies before his term begins; in such a case there is a vacancy.¹ But if the successor dies, after election, and before qualification, there is no vacancy, and the incumbent holds over.² So if an officer is reelected, and dies without qualifying, before the new term begins, the person appointed to fill the vacancy holds only till the old term ends; and there must be a new election for the new term.³ And if a successor is elected, who fails to qualify, and resigns, and another is appointed his successor, the term of the former incumbent comes to an end.⁴ Where the incumbent of an office had held the same for eight years, and a constitutional provision prohibited any person from holding the office more than eight years; it was held, that upon the failure of his successor to qualify, he could not hold over, and that there was a vacancy.⁵ If the people fail to elect an officer's successor, or the person elected by them fails to qualify, there is no vacancy, and the incumbent holds over.⁶ If there is no constitutional or statutory restriction, respecting the length of time for which an officer may hold over, he may so hold for an indefinite time.⁷

§ 330. **Rule where legislature fails to elect a successor.**—Where a statute, creating an office, and fixing the duration of the term thereof, provides that the officer shall be elected by the legislature, and shall hold his office until his successor is elected and qualified; the failure of the legislature to elect a successor, at the expiration of the incumbent's term, does not create a vacancy, which may be filled by the governor, under a provision

¹ *State v Bemenderfer*, 96 Ind. 374;
State v Seay, 64 Mo. 89.
See also *State v Hopkins*, 10 Ohio St.
509.

² *Comm. v Hanley*, 9 Pa. St. 513.
Accord, *State v Benedict*, 15 Minn. 198;
State v Jenkins, 43 Mo. 261.

³ *Worley v Smith*, 81 N. C. 304.

⁴ *State v Cocke*, 54 Tex. 482.

⁵ *Gosman v State*, 106 Ind. 203.

⁶ *Borton v Buck*, 8 Kan. 302.

⁷ *State v Spears*, 1 Ind. 515.

authorizing him temporarily to fill vacancies; but the incumbent holds over until his successor is elected by the legislature.¹ And where the governor is authorized to appoint a person, to hold until the end of the next session of the legislature, and he appoints for a full term; this is in legal effect an appointment until the end of the next session; but the person so appointed holds over until his successor is chosen.² The rule is the same, where a vacancy occurs in a body, which the body is authorized to fill temporarily, until the next meeting of the legislature.³ Where the successor is to be appointed by the legislature, if the incumbent's term expires during the recess of the legislature, there is no vacancy which the governor can fill, but the incumbent holds over.⁴

§ 331. **Rule where officer chosen for fragment of a term; where statute creates vacancy.**—Where an official term is extended by statute, and a new election is held for the extended period only, the person so elected holds over, with like effect as the incumbent of a full term.⁵ The same rule holds, where a person is appointed to fill a vacancy in an office, and for the unexpired term only.⁶ And even where a statute provides, that the failure of an officer elect to qualify, within a prescribed time, creates a vacancy in the office, this will be controlled by a general provision, that an officer shall hold over, till his successor is chosen and qualifies.⁷

§ 332. **Rule in case of reappointment or reelection; where election contested.**—The application of the rule to cases where the incumbent of an office is reelected or

¹ *People v Tilton*, 37 Cal. 614, overruling *People v Reid*, 6 Cal. 288, and approving *People v Whitman*, 10 Cal. 38.

Accord, *State v Harrison*, 113 Ind. 434.

See also *State v Lusk*, 18 Mo. 333.

² *People v Parker*, 37 Cal. 639.

³ *State v Davis*, 45 N. J. L. 390.

⁴ *People v Crissey*, 91 N. Y. 616.

⁵ *People v McIver*, 68 N. C. 467.

⁶ *Branham v Long*, 78 Va. 352.

⁷ *People v Tyrrell*, 87 Cal. 475.

reappointed, or is a candidate for reelection, at an election where no choice is made, or the result is contested, presents some nice questions, with respect to which the decisions are not always harmonious. Such a case has already been cited in a previous section.¹ In another, where M, the incumbent of the office of alderman of a city, and F, were candidates at an election held for a successor to M; and two of the four inspectors of election made a statement, certifying that F had received a majority of the votes cast, which was filed, whereupon F took the oath of office; but the other two refused to sign the statement; it was held, that until the rights of the two were settled by proceedings in the courts, the election was to be deemed a failure, and neither party could claim any benefit therefrom; and that, as the city charter provided, that all the city officers should hold their offices "until a successor is duly qualified," M held over until the courts should decide that F was elected.² But where the incumbent of an office is a candidate for reelection, and his competitor is declared to be elected by the proper authorities, and receives a certificate, regular in form, the incumbent cannot retain the office on an allegation of irregularity or falsity of the canvass, but must surrender it, and bring a quo warranto or other proceeding to oust his competitor; otherwise he is liable upon his official bond.³

§ 333. **The same subject.**—It has been held, that where an officer is chosen to be his own successor, but fails to qualify, he holds over under the rule.⁴ But, on the contrary, it has also been held, that in precisely the same case, his failure to qualify vacates the office, so that he

¹ *Worley v Smith*, 81 N. C. 304; *ante*, § 329.

² *People v Crissey*, 91 N. Y. 616.

³ *Supervisors v O'Malley*, 46 Wis. 35.

See also *State v Norton*, 46 Wis. 332;
Brooke v Widdicombe, 39 Md. 386.

⁴ *Bath v Reed*, 78 Me. 276.

Accord, *State v Berg*, 50 Ind. 496.

does not hold over.¹ Where the incumbent is reëlected and recommissioned, and enters upon his duties under the new commission, and the judgment of a competent tribunal declares that the second election was void, the incumbent does not hold over, although there is a statutory provision that an officer shall hold until the qualification of his successor; but the office is vacant.² But, in another case, it was held, that the incumbent of an office is not prevented from holding over, by his having taken an official oath and filed an official bond, under a pretended but unlawful election for a new term.³ And it has also been said, that where an officer is a candidate for reëlection, and is defeated at the polls, but claims that he is reëlected and qualifies anew, this is a renunciation of any right to hold over; and if he cannot maintain his right under the second election, he must be deemed to have resigned the office, and is estopped from afterwards admitting his defeat, and insisting upon a right to hold over.⁴ An officer who prevents a person, lawfully chosen to be his successor, from qualifying, by withholding his certificate and commission, cannot set up his failure to qualify, as a defence in a proceeding to oust the wrongdoer.⁵

§ 334. **Rule where statute gives one officer same term as another.**—Where the constitution declares that the judges of the county courts shall hold office for four years, and until their respective successors shall qualify, and that a county clerk shall be elected in each county “whose term shall be the same as that of the presiding judge of the county court;” a county clerk does not continue in office, after the four years, until his successor

¹ *Scott v Ring*, 29 Minn. 398.

cited *ante*, § 312.

² *Handy v Hopkins*, 59 Md. 157.

⁴ *Ex parte Smith*, 8 S. C. 495.

³ *Forristal v People*, 3 Ill. App. 470.

See also, *Ex parte Norris*, 8 S. C. 408.

See also *Stadler v Detroit*, 13 Mich. 348,

⁵ *State v Steers*, 44 Mo. 223.

qualifies, since the county judges' terms, as fixed by the constitution, end in four years, and the time of their holding over is not a part of their terms.¹

§ 335. **Officer holding over entitled to emoluments.**—Where a newly elected officer fails to qualify, until after the beginning of the new term, although the delay is occasioned by a delay in canvassing the votes, and the incumbent consequently holds over; the latter is entitled to the emoluments of the office until the former qualifies.²

§ 336. **Power of officer after term expires; rule as to sheriff.**—In many instances, the law allows an officer to do certain official acts, after the expiration of his term, and the surrender of his office to his successor. Such acts consist only of those, which are necessary to complete an official act, which he had begun to execute during his term, or to correct errors or supply deficiencies in his official proceedings. It is generally provided by statute, that a sheriff, marshal, constable, or other officer, who has begun to execute judicial process during his term, may complete the execution thereof after the term expires. But, independently of any statute, it was long since established at common law, that a sheriff, who had levied an execution during his term, might, after the term, proceed to sell the goods without a *venditioni exponas*.³ And the rule is stated thus broadly by the supreme judicial court of Massachusetts: “It is a general rule of the common law, that where an officer has once commenced the service of process, he is entitled, and even bound, to proceed to its completion, although he may have been

¹ *Leeman v Hinton*, 1 Duv. (Ky.) 37.

² *Hubbard v Crawford*, 19 Kan. 570.

³ *Ayre v Aden*, Cro. Jac. 73;
Clerk v Withers, 6 Mod. 290; 1 Salk, 323;
 2 Ld. Ray. 1072; 11 Mod. 35.

See also *Bondurant v Buford*, 1 Ala.
 359; 35 Am. Dec. 33;
Colyer v Higgins, 1 Duv. (Ky.) 6;
Doe d. Stevens v Donston, 1 B. & Ald.
 230.

removed from or gone out of office.”¹ So a sheriff, who has levied upon and sold property to satisfy an execution, may make return of the execution after the expiration of his term; and his deputy sheriff may do so in his name.² It has been also held, that where an attachment has been levied upon goods, by a sheriff, who is out of office when the judgment is recovered, the execution shall be issued to and executed by him.³ But another case holds that in such a case the execution must go to the new sheriff.⁴

§ 337. **Collector of assessments may give deed after term expires.**—Where a statute provided that a collector of assessments, appointed by the Brooklyn park commissioners, shall, upon a sale of land by him, “give certificates of sale to purchasers, and shall also execute and deliver conveyances of the land so purchased, unless they shall have been redeemed;” it was held that a collector, who had sold lands and given the certificates, must execute and deliver the deeds therefor, upon the expiration of the time allowed for redemption, although he had previously resigned his office, and another person had been appointed in his place.⁵

§ 338. **Rulings as to powers of particular officers after term expires.**—It has been held that a former town officer has power to make such amendments of the records of the town, kept by him while he was in office, as may be required in order to correct mistakes and supply omissions.⁶ And a tax bill may be certified anew by a city engineer, after the expiration of his term, to cure

¹ *O'Brien v Annis*, 120 Mass. 143, approving *Capen v Doty*, 13 Allen (Mass.) 262.

² *Welsh v Joy*, 13 Pick. (Mass.) 477.

³ *McKay v Harrower*, 27 Barb. (N. Y.) 463. See also *German Am. Bk. v Morris Run Coal Comp'y*, 68 N. Y. 585, per Earl, J., p. 589.

⁴ *Johnson v Foran*, 58 Md. 148.

⁵ *People v Taylor*, 9 Hun (N. Y.) 143.

⁶ *Kiley v Cranor*, 51 Mo. 541; *Gibson v Bailey*, 9 N. H. 168.

So errors, etc., in an administrator's deed may be thus corrected. *Rugle v Webster*, 55 Mo. 246.

informalities in his certificate thereto.¹ The mode of making such amendments in town records by a town officer, and the control of the courts over the same, have been regulated by a series of decisions in New Hampshire.² But, in Massachusetts, the courts hold that a town officer cannot amend the record, after his term of office has expired, unless he has been reëlected.³ In Maine, it has been held that a justice of the peace, in making up and completing his records, acts ministerially, not judicially, and consequently that he may do so after the expiration of his term.⁴ In another state, it has been held, that a circuit judge may settle a bill of exceptions, after his term has expired.⁵ Usually powers of this description are expressly given by statute. But a judge has no power, after his resignation has taken effect, to allow a motion for a new trial, in a case tried before him, while he was in office.⁶

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¹ *Kiley v Oppenheimer*, 55 Mo. 374.

² *Low v Pettengill*, 12 N. H. 337;
Cass v Bellows, 31 N. H. 501;
Pierce v Richardson, 37 N. H. 303.

³ *Hartwell v Littleton*, 13 Pick. (Mass.) 229;

School Dist. v Atherton, 12 Met. (Mass.) 105.

Halleck v Boylston, 117 Mass. 469.

Accord, *People v Highway Com'rs*, 16 Mich. 63.

⁴ *Matthews v Houghton*, 11 Me. 377.
 Contra, *Gaillard v Anceline*, 10 Mart. (La.) 479.

⁵ *Oliver v Town*, 24 Wis. 512.

⁶ *Griffing v Danbury*, 41 Conn. 96.

⁷ *Ante*, §§ 212, 213.

CHAPTER XVI

REMOVAL; SUSPENSION

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§ 340. **Scope and subject matter of chapter.**—We shall consider in this chapter the rules of law, applicable to the various modes of depriving a person, against his will, of

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I. Effect of express constitutional provisions upon the power to remove an officer.

§ 341. **Legislature cannot vary or add to constitutional provisions.**—It is well settled, that where the constitution creates or recognizes an office, and declares that the incumbent may be removed in a specified manner or for specified reasons, the legislature cannot constitutionally provide by statute for his removal for any other reason or in any other manner.² And where the constitution specifies certain classes of offences, as those for which an officer may be removed, a statute adding others, or declaring that a particular offence, which is not one of those classes, shall be “deemed” such, is unconstitutional.³ And where the constitution provides that the duration of any office, not fixed in the constitution itself, may be fixed by law, and if not so fixed, the incumbent shall hold during the pleasure of the appointing power; the legislature cannot limit the power of removal of an officer whose term is not fixed by law; the only mode of limiting the power is to fix the term by law.⁴ Such a provision by implication withholds from

¹ *Post*, ch. 19 and 21.

² *Lowe v Comm.*, 3 Met. (Ky.) 237;
State v Wiltz, 11 La. Ann. 439.

See also *ante*, § 305;

Brown v Grover, 6 Bush (Ky.) 1;

Page v Hardin, 8 B. Mon. (Ky.) 648;
Runnels v State, 1 Miss. 146.

³ *Comm. v Williams*, 79 Ky. 42.

⁴ *People v Hill*, 7 Cala. 97.

the governor, power to remove an officer, whose term is fixed by law.¹

§ 342. **When provision self-operative, and leaves no discretion.**—A constitutional provision, that certain judges and officers of courts may be removed by the judges of the district courts, for certain specific causes, “upon the cause therefor being set forth in writing, and the finding of its truth by a jury,” is self-operating, so that it may be executed without legislation.² And where the constitution provides for the removal of an officer by sentence of the court, upon conviction of wilful neglect of duty or misdemeanor in office, the court, upon the conviction of a person indicted for either offence, has no discretion with respect to that part of the sentence.³

§ 343. **Statutes authorizing trial or removal without notice, constitutional.**—It was held in Louisiana, that a provision in a city charter, giving to one of the branches of the city council, sole power to try an impeachment of a city officer, and, upon his conviction, to pronounce judgment of removal, and, if it deems proper, of disqualification from holding any city office, was not unconstitutional, as vesting judicial powers in a municipal body.⁴ A statute authorizing an officer or a board to remove a person from office, without notice or a hearing, is not in conflict with the “bill of rights,” incorporated into the constitution.⁵

§ 344. **Rule where constitution authorizes governor to remove his appointees.**—A constitutional provision, empowering the governor to remove “any officer whom he may appoint,” includes officers appointed by him by and

¹ *People v Jewett*, 6 Cal. 291.

² *Trigg v State*, 49 Tex. 645.

³ *Shattuck v State*, 51 Miss. 575.

⁴ *State v Ramos*, 10 La. Ann. 420.

See also *Tompert v Lithgow*, 1 Bush (Ky.) 176.

⁵ *Donahue v Will County*, 100 Ill. 94;
People v Whitlock, 92 N. Y. 191.

See also *Stern v People*, 102 Ill. 540.

with the advice and consent of the senate, and extends to cases for which other specific remedies are provided.¹ And where such a provision specifies the causes for which he may thus remove, but prescribes no mode of exercising the power, the governor may determine that such cause exists, upon such evidence and in such mode as he deems proper.² But he can exercise the power only for one of the causes specified, and upon charges specifying the particular act, omission, or other ground of removal; and the officer must have notice thereof, and a reasonable opportunity to be heard in his defence; and the governor has judicial power to decide upon the proofs.³ But it is not necessary that the governor should specify the causes.⁴

II. Power of the legislature, in the absence of constitutional limitations.

§ 345. **Legislative power unlimited; office confers no vested rights.**—As we have shown in a previous chapter,⁵ in this country an office is not regarded as property, nor has the officer any vested rights therein, which are within the protection of the United States constitution, or the general provision of a state constitution, forbidding legislative interference with property or vested rights. It follows that the power of the legislature, in this respect, is practically unlimited, except where it is limited by provisions of the constitution, having express or implied reference to this particular subject.

§ 346. **Whether power ministerial or judicial; removal by statute invalid.**—Thus the legislature has power to

¹ Wilcox v People, 90 Ill. 186.

See also *post*, §§ 361-365.

² Wilcox v People, 90 Ill. 186.

⁴ Keenan v Perry, 24 Tex. 253.

³ Dullam v Willson, 53 Mich. 392.

⁵ *Ante*, ch. 2.

provide that a city officer, appointed under a statute which authorized his removal by the governor, for cause, and after notice and a hearing, may be removed by the mayor "for any cause deemed sufficient by himself;" and such a provision empowers the mayor to remove the officer without notice or hearing.¹ The power to remove a state officer has been regarded in New Jersey as judicial, and on that ground one which cannot be constitutionally exercised by the governor, but only by the court of impeachments.² But it has been elsewhere regarded as ministerial,³ and thus capable of being conferred by the legislature upon ministerial officers, in the absence of constitutional restrictions; although, where specific causes are required, and a notice and a hearing must be had to render a removal lawful, the removing officer or body proceeds in a judicial manner, so that the decision may be reviewed by the courts.⁴ In the absence of power, expressly conferred upon the legislature by the constitution, to remove an officer, a statute, ousting the incumbent of an office, without abolishing the office, is unconstitutional, as the power to appoint and remove officers, is not conferred by the constitutional grant of legislative power.⁵ So it has been held, that the legislature cannot indirectly accomplish the same object, as by a statute shortening the incumbent's tenure of the office.⁶ A statute, empowering a court to remove an officer summarily, upon a written accusation and after a hearing, is constitutional, and contemplates proceedings instituted by a private person, and not an indictment or an information.⁷ A constitutional provision for the

¹ *People v Whitlock*, 92 N. Y. 191.

² *State v Pritchard*, 36 N. J. L. 101.
See also *Territory v Cox*, 6 Dak. 501;
Page v Hardin, 8 B. Mon. (Ky.) 648;
Evans v Populus, 22 La. Ann. 121;
Dullam v Willson, 53 Mich. 392.

³ *Donahue v Will County*, 100 Ill. 94;
Stern v People, 102 Ill. 540.

⁴ See *post*, Division X of this chapter.

⁵ *Cotten v Ellis*, 7 Jones L. (N. C.) 545.
See also *State v Wiltz*, 11 La. Ann.
439; and *post*, § 352;
Hoke v Henderson, 4 Dev. (N. C.) 1.

⁶ *Hoke v Henderson*, 4 Dev. (N. C.) 1, at
p. 24.

⁷ *Woods v Varnum*, 85 Cal. 639.

removal of officers for specified causes, does not invalidate a statute, excluding them from office for failure to qualify.¹

III. What is or is not a removal, especially within the constitutional or statutory provisions restricting the power of removal.

§ 347. **To what cases such provisions apply.**—It has been held, in many cases, that the constitutional or statutory provisions, which allow a removal only for cause, or for cause and after notice and a hearing, do not apply to a dismissal of an officer, for some reason other than his own act or default, and where there is no intent to appoint another in his place. Thus, where a statute provides for notice and a hearing before removal, an officer may be discharged without either, where the discharge is made, because the services which he renders are no longer needed, or no funds are provided with which to pay him. The court said: “This is not, properly speaking, a case of removal within the meaning of the statute. Here the office or clerkship was abrogated.”² And the person, thus dismissed, cannot require the courts to review the decision of the board or officer thus discharging him.³ The same rule holds, where a dismissal is made for the purpose of reducing expenses by diminishing the force;⁴ or where a transfer is made from one class of subordinates to another; as where the police board transfers a member of the detective force to the patrol force;⁵ or the board of fire commissioners transfers an assistant engineer to the force of machinists; although the transfer involves a

¹ Hyde v State, 52 Miss. 665.

See also, People v Fire Com'rs, 72 N. Y. 445.

² Phillips v Mayor, etc., 88 N. Y. 245, aff'g 13 Week. Dig. (N. Y.) 426.

³ People v French, in last note.

Accord, People v French, 25 Hun (N. Y.) 111; 10 Abb. N. C. (N. Y.) 418; Langdon v Mayor, etc., 92 N. Y. 427, aff'g 27 Hun (N. Y.) 288; 63 How. Pr. (N. Y.) 134.

⁴ People v Health Department, 24 Week. Dig. (N. Y.) 197.

⁵ State v Police Com'rs, 49 N. J. L. 175. See, however, Michaelis v Jersey City, 49 N. J. L. 154.

reduction of compensation.¹ But a power, conferred upon police commissioners, to remove subordinates for the purpose of reducing the force, cannot be exercised to create a vacancy for the appointment of another person.² It is not a ground for interference, by the courts, with a removal for the purpose of reducing expenses, that the funds at the disposal of the commissioners are sufficient to pay the entire force employed; for they are not bound to exhaust the appropriation; on the contrary, it is their duty to administer the department as economically as possible; nor that the duties of the officer removed were transferred to another at a larger salary, if he was not newly appointed for that purpose.³ Where a transfer is made to an inferior position, involving inconsistent duties, that is, perhaps, a removal; but if the person so transferred accepts the new position, without protest, and signs the pay rolls for the reduced salary, he waives any right to object thereto.⁴

§ 348. **When revocation of appointment not a removal; effect of judicial reversal of removal.**—A statute, thus restricting the power of removal, does not apply to the revocation by police commissioners of the appointment of a policeman, because he was ineligible to receive the appointment, ex. gr., where he had been previously convicted of a crime.⁵ Where a board of fire commissioners, who were authorized to remove subordinates only after notice and a hearing, discharged one of their officers, and, supposing that his place was vacant, promoted an officer of lower rank to fill it, and promoted the

¹ *Riley v Mayor, etc.*, 96 N. Y. 331, aff'g 49 N. Y. Super. Ct. 537;

Monroe v Mayor, etc., 28 Hun (N. Y.) 258.

See, however, *In re Gleese*, 50 N. Y. Super. Ct. 473.

² *State v Schumaker*, 27 La. Ann. 332.

³ *People v French*, 25 Hun (N. Y.) 111; 10 Abb. N. C. (N. Y.) 418.

⁴ *Reilly v Mayor, etc.*, 48 N. Y. Super. Ct. 274.

⁵ *People v Police Com'rs*, 102 N. Y. 583, aff'g 39 Hun (N. Y.) 507.

relator to fill the place of the latter; and the person discharged procured a reversal of their decision upon certiorari, and was accordingly restored to his former position, and the two promoted officers were then restored to their former positions; it was held, that the retransfer of the relator to his former position was not a removal within the statute; although the resolution promoting him did not state that he was appointed to fill a vacancy.¹

§ 349. **When appointment is complete, revocation is invalid.**—Obviously the question, whether a person is the incumbent of an office, so as to be capable of removal, and entitled to insist upon the statutory provisions restricting or regulating the power of removal, often depends upon the question, whether his appointment or election to the office was complete, so that he was vested with the title thereto, either absolutely, or upon his qualifying. The latter question was considered in a former chapter.² We now recur to this subject, to show how the rules respecting removals apply to cases, where an appointing power reconsiders or revokes an appointment, or, without expressly removing the incumbent, appoints another in his place. The governor of a state, having power, by the constitution and statutes of the state, to appoint to an office, for a specified term, but to remove the incumbent only for cause, has no power to revoke a commission; issued to a person appointed by him to the office.³ So, where the appointment to an office by a board is complete, and a removal can be made only for cause, a resolution rescinding the appointment, does not effect a removal, nor affect in any manner the rights of the person appointed.⁴

¹ *People v Fire Com'rs*, 114 N. Y. 67, aff'g 47 Hun (N. Y.) 528.

The reversal of a judgment removing an officer restores him, without further order. *Phares v State*, 3 W. Va. 567.

² *Ante*, ch. 8, §§ 88 *et seq.*

³ *Ewing v Thompson*, 43 Pa. St. 372.

⁴ *Att'y Gen'l v Love*, 39 N. J. L. 14; aff'd *id.* 476;
People v Stowell, 9 Abb. N. C. (N. Y.) 456.

§ 350. **Where appointment of successor is ipso facto a removal.**—Where an office is held during pleasure, the appointment of a successor is a removal of the incumbent; but if the senate must concur with the governor in a removal, in order to render it effectual, or if the removal is required to be made by the senate, on the recommendation of the governor; the appointment by the governor of a person to fill the office, with the advice and consent of the senate, is not a removal of the incumbent, and is ineffectual.¹

§ 351. **Removal ineffectual unless intent clear; when intent inferred.**—Where an officer is removed, the intent to remove him must clearly appear, as is well illustrated by a decision of the supreme court of the state of Michigan. In that case, the charter of the city gave the common council power to remove city officers at pleasure; and, as the court construed the statute, the term of office of a city marshal was fixed by law at two years; but the common council, at the expiration of one year from the appointment of a person to that office, without in terms removing him, appointed another to the office. It was held, that such appointment was not equivalent to a removal of the incumbent, and did not divest him of the office, notwithstanding the facts that the council, in the resolution appointing him, stated that he was appointed for one year, and that his official bond recited an appointment for that time. The court, after holding that the recitals of the resolution and of the bond, as to the duration of the term, were surplusage, continued: “A removal cannot be made, without an intent to remove; and here it is clear that the council did not suppose they

People v Carrique, 2 Hill (N. Y.) 93.
Comm. v Stifer, 25 Pa. St. 23, per
 Lewis, Ch. J., p. 29;
Ex parte Hennen, 13 Pet. (U. S.) 230,
 per Thompson, J., p. 261.

See also *Thomas v Burrus*, 23 Miss. 550;
Johnston v Wilson, 2 N. H. 202;
Van Orsdall v Hazard, 3 Hill (N. Y.) 243;
White v Mayor, etc., 4 E. D. Smith (N.
 Y.) 563.

were exercising their power to remove, and they cannot, therefore, be held to have intended it. . . . The removal of an officer usually is supposed to imply censure of his conduct; and the appointing body might hesitate to remove, when, if the office were vacant, they might prefer some other person to fill it.”¹ But the intent may be inferred, without being expressly declared, where the circumstances leave no doubt of its existence. Thus, where the mayor of a city was authorized by statute to suspend, and, with the assent of the council, to remove, any city officer; and he sent a message to the council, suspending an officer for reasons assigned, and recommending his removal; and the council passed a resolution to the effect that the mayor’s message was “received, and action of the mayor confirmed;” it was held that the officer was sufficiently removed.²

§ 352. **Effect of abolition or transfer of office.**—Where there is no power of removal, except for cause, an officer cannot be removed by a statute, abolishing his office, and transferring its powers and duties to another, to be chosen by a board.³ But where a city ordinance, creating a municipal office, reserves to the municipal council the power of removal; if the ordinance is repealed, and the incumbent notified, that operates as a removal.⁴

§ 353. **If office double, removal from one leaves other intact.**—In a state where the sheriff is also tax collector, if a statute authorizes the county court, where there is a vacancy in the office of sheriff, from any cause other than the incumbent’s death, to appoint a person to collect the taxes; and the sheriff is removed, but no person is thus appointed to collect the taxes; the sheriff must proceed

¹ *Stadler v Detroit*, 13 Mich. 346.

² *Westberg v Kansas*, 64 Mo. 493.

³ *State v Leonard*, 86 Tenn. 485.
See also *ante*, § 346.

⁴ *Chandler v Lawrence*, 128 Mass. 213.

See also *Brackett v Blake*, 7 Met. (Mass.) 335;

Knowles v Boston, 12 Gray (Mass.) 339;
Murphy v Webster, 131 Mass. 482.

to collect them, notwithstanding his removal, and the sureties in his official bond are liable for his failure so to do.¹

IV. Rules determining the officer or board vested with power to remove.

§ 354. **When officer removable at pleasure.**—The general rule is, that where a definite term of office is not fixed by law, the officer or officers, by whom a person was appointed to a particular office, may remove him at pleasure, and without notice, charges, or reasons assigned.² But in Rhode Island, it was held that a school committee, under a statute which gave the committee power to appoint its officers, but was silent as to the power of removal, had the power of removal for cause, but only upon a trial and after notice; and that a vote removing the appellant for a cause assigned, without notice of the charges, and “an opportunity by proof and argument to defend himself” was void; so that the appellant continued to be legally the clerk of the board. It was said, however, that if the clerk, being present

¹ *Ballard v Thomas*, 19 Gratt. (Va.) 14.

² *Ex parte Hennen*, 13 Pet. (U. S.) 230.
See also *Patton v Vaughan*, 39 Ark. 211;
People v Hill, 7 Cala. 97;
Smith v Brown, 59 Cala. 672;
Carr v State, 111 Ind. 101;
State v Barrow, 29 La. Ann. 243;
Newson v Cocke, 44 Miss. 352;
Peyton v Cabaniss, 44 Miss. 808;
People v Fire Com'rs, 73 N. Y. 437;
People v Robb, 126 N. Y. 180;
People v Mayor, etc., 5 Barb. (N. Y.) 43;
Laimbeer v Mayor, etc., 4 Sandf. (N. Y.) 109;
People v Durston, 3 N. Y. Supp. 522;
People v Hayden, 32 N. Y. St. Rep'r 1116;
10 N. Y. Supp. 794;
People v Purroy, 31 N. Y. St. Rep'r 934;
10 N. Y. Supp. 181;

Comm. v Slifer, 25 Pa. St. 23;

Houseman v Comm., 100 Pa. St. 222;

Williams v Boughner, 6 Coldw. (Tenn.) 486, and other cases cited *ante*, § 304, and *post*, §§ 361 *et seq.* Contra, *Dubuc v Voss*, 19 La. Ann. 210.

It has been said, that notice of the removal to the officer removed is necessary to complete the removal. *Comm. v Slifer*, 25 Pa. St. 23. See also, *People v Carrique*, 2 Hill 93. But the court of appeals of New York has held, that notice is not necessary to complete the removal, although it may be required to convert the officer into a trespasser, or affect others' rights. *Holley v Mayor, etc.*, 59 N. Y. 166.

when the resolution of removal was presented, asked no delay, but proceeded to defend himself, he would be deemed to have waived formal notice, and the vote would be valid.¹ And it is conceded, in all the cases, that where a fixed term is assigned to the office, the appointing power has no absolute power of removal.² But a constitutional provision, declaring that where the duration of an office is not provided for by the constitution, or fixed by law, the office shall be held "during the pleasure of the authority making the appointment," applies only where the appointing authority is continuous; and a statute, empowering the supervisor, the president of the excise commission, and the justice of the peace in office, having, at the time of the passage of the act, the shortest time to serve, or a majority of them, to appoint three police commissioners; and further providing that in case of a vacancy in the office, it shall be filled by the supervisor; contemplates only a single act of appointment, which exhausts the authority conferred; so that the provision empowering the supervisor to fill subsequent vacancies is constitutional.³

§ 355. **What authority has power to remove.**—Where an officer (in this case a chief of police), elected by the people of a city, performing his duties in the city, and paid from the city treasury, is a state officer, the mayor has no power to remove him, under a constitutional provision giving the mayor of a city power to remove city officers, and a statute giving him power to suspend temporarily the chief of police.⁴ Where the power to remove a city officer is conferred upon the mayor and common council, it cannot lawfully be exercised by the council alone.⁵ And where the charter of

¹ Willard's appeal, 4 R. I. 595.

² *Caulfield v State*, 1 S. C. 461;
Collins v Tracy, 36 Tex. 546.
See also *post*, §§ 361-365.

³ *Bergen v Powell*, 94 N. Y. 591, *aff'g* 30 Hun (N. Y.) 438.

⁴ *Burch v Hardwicke*, 30 Gratt. (Va.) 24.

⁵ *Charles v Hoboken*, 27 N. J. L. 203.

a city confers the power of removal upon a particular board, the board cannot, by any act, deprive itself of that power.¹ Where power to remove a township officer is conferred upon the board of the township, the power cannot lawfully be exercised at a joint meeting of two township boards.²

§ 356. **Different methods of removal allow resort to either.**—A provision of the constitution, authorizing the removal of a judicial officer by the governor, with the consent of the council, upon the address of both houses of the legislature, applies to a case where the judge is charged with an offence, which renders him liable to impeachment; and it is not necessary that the address or the order of removal should assign any cause for the removal.³

V. Who is liable to be removed; who is entitled to the benefit of the constitutional or statutory restrictions upon the power of removal.

§ 357. **Removal of lunatic valid.**—Where a person who was a lunatic, and actually confined in a lunatic asylum, was dismissed from the fire department, after notice and upon charges, and after a trial, under a statute requiring those proceedings to be taken to validate a removal; and the fact that he was a lunatic did not appear upon the trial; it was held that the removal was lawful, for, until he had been judicially declared a lunatic, the fire commissioner was not required to take proceedings for the appointment of a committee.⁴

¹ *Weidman v Board of Education*, 26 N. Y. St. Rep'r 765; 7 N. Y. Supp. 309.

In re King, 25 N. Y. St. Rep'r 792; 6 N. Y. Supp. 420.

² *Crawford v Township Boards*, 24 Mich. 248.

⁴ *People v Partridge*, 13 Abb. N. C. (N. Y.) 410.

³ *Comm. v Harriman*, 134 Mass. 314. See also, *post*, § 400;

See also *post*, §§ 365, 374, 416.

§ 358. **Appointee to fill vacancy, removable.**—Where the constitution of a state provides that a sheriff shall hold his office for three years, but he may be removed by the governor upon charges, after an opportunity to be heard; and a statute provides, that the governor may fill a vacancy in the office of sheriff, caused by such removal, by appointing a person to serve until the next general election, who “shall possess all the rights and powers, and be subject to all the duties and obligations, of the officer so removed;” a person, appointed by the governor to fill a vacancy, caused by the removal of a sheriff, may be removed, and another appointed in his place, by the governor’s successor, under a general statute giving power to the governor to remove officers appointed by him, and to fill vacancies, without notice to or charges against the officer so removed.¹

§ 359. **Policeman entitled to retirement, removable.**—Where a statute provided that any member of the police force of a city, who has performed duty therein for twenty years, upon his own application in writing, “shall, by resolution adopted by a majority vote of the full board, be relieved and dismissed from the said force and service, and placed on the roll of the police pension fund,” and receive a pension to be fixed by the police board; and, after a service of twenty years, a member of the force committed an offence, rendering him liable to be removed, upon notice and charges, and after a hearing; and, within an hour or two before notice and charges were served upon him, he filed his application for a dismissal under the statute; it was held, that the subsequent hearing and order of removal were valid and regular, inasmuch as, under the statute, his connection with the force, or the power of police board over him, did not terminate upon his filing the application, since the action of the board,

¹ *People v Parker*, 6 Hill (N. Y.) 49.

retiring him and fixing his pension, was necessary to effect such severance; and that the officer was not therefore entitled to a mandamus, to compel the board to take such action.¹

§ 360. **To what officers constitutional and statutory provisions apply.**—The constitutional or statutory provisions, restricting the power of removal, apply only to an officer who has qualified, and has been inducted into office;² and it has been held also, that they apply only to an officer who has been lawfully and regularly appointed.³ But it has been also decided, that after a person has held an office for four years, the objection that he was irregularly appointed, in violation of the civil service law, cannot be taken, upon a certiorari brought by him, to review the proceedings whereby he was removed.⁴

VI. Cases where an officer may be removed without cause assigned, and where only for cause.

§ 361. **When officer removable at pleasure, no cause required.**—The law, relating to the power to remove without cause, has already been incidentally considered, in discussing the question, who has the power of removal.⁵ The general rule is thus stated, in a case decided by the supreme court of Pennsylvania: "Where an appointment is during pleasure, or the power of removal is entirely discretionary, there the will of the appointing or removing power is without control, and no reason can be asked for, nor is it necessary that any cause should be assigned."⁶ In

¹ *People v French*, 108 N. Y. 105, aff'g 44 Hun (N. Y.) 24.

See also, *People v French*, 46 Hun (N. Y.) 232.

² *Flatam v State*, 56 Tex. 93.

³ *State v Gloucester*, 49 N. J. L. 177.
See also *ante*, § 348.

⁴ *People v Hannan*, 56 Hun (N. Y.) 469.

⁵ *Ante*, §§ 354 *et seq.*

⁶ *Field v Comm.*, 32 Pa. St. 478, per Read, J., p. 481, citing *Ex parte Hennen*, 13 Pet. (U. S.) 230, where the question is fully discussed.

a case, which was decided by the New York court of appeals, where one section of a statute provided, that the mayor of a city "shall from time to time appoint and remove at pleasure two persons, who . . . shall be commissioners of accounts;" and another section provided, that certain officers named, and all others whose appointment was in that section provided for, "shall be nominated by the mayor, and appointed by him with the consent of the board of aldermen, and may be removed by the mayor, for cause, and after opportunity to be heard;" it was held, that a commissioner of accounts was not within the provisions of the latter section, as he was not to be nominated by the mayor, but appointed by him, without the consent of the board of aldermen; and consequently that he might be removed by the mayor, without notice or cause. Danforth, J., delivering the opinion of the court, added: "It would seem, however, to be quite clear, that whenever a statute in express terms gives a discretionary power to any person, to be exercised by him upon his own pleasure, he is thus made the sole and exclusive judge as to the propriety of its exercise; and in such a case his will or private opinion must stand in place of any reason. Such a power is not to be construed as a judicial discretion, to be regulated according to the known rules of law. . . . It may be arbitrary and fanciful, but such was the condition of the relator's official tenure. He took office at the pleasure of the mayor, and his pleasure, by whatever reason influenced, is the measure of his term." ¹ Where a

¹ *People v Mayor, etc.*, 82 N. Y. 491; aff'g 16 Hun (N. Y.) 309.
See also, *Territory v Cox*, 6 Dak. 501;
Williams v Gloucester, 148 Mass. 256;
People v Comptroller, 20 Wend. (N. Y.) 595;
People v Whitlock, 92 N. Y. 191;
Weidman v Board of Education, 26

N. Y. St. Rep'r 765; 7 N. Y. Supp. 309.
State v Stevens, 46 N. J. L. 344;
Comm. v Sutherland, 3 S. & R. (Pa.) 145;
Field v Girard College, 54 Pa. St. 233;
State v McGarry, 21 Wis. 496.

statute provides, that particular classes of members of the fire department of a city can be removed only for cause and upon notice, any member of the department, who does not belong to either of the classes enumerated, may be removed at the pleasure of the board.¹

§ 362. **At common law, removal only for cause.**—We shall have occasion to cite, in the next succeeding division of this chapter,² many rulings, that in particular cases removals can be made for cause only; here it will be necessary only to state the general rules relating to that subject. The doctrine, that an officer may be removed at pleasure, has grown up in the American courts; at common law, an officer could be removed only for cause and after a hearing.³ And in this country, it has been said that, in the absence of any statutory provision, the same rule applies to an officer of a municipal corporation.⁴ Where the constitution gives to the appointing power authority to remove, at pleasure, officers, the duration of whose term is not fixed by law, that operates to withhold such authority, where the duration of the term is fixed by law.⁵ Where power is granted, by a statute or the constitution, to remove an officer for certain specified causes, that limits the power of removal to the causes so specified.⁶ And where a city charter provided for the removal of appointed officers, by a majority vote

¹ *People v Fire Com'rs*, 86 N. Y. 149, aff'g 23 Hun (N. Y.) 317.

² *Post*, §§ 364, *et seq.*

³ *Bagg's case*, 11 Coke (Vol. 6) 98 (b); *Rex v Gaskin*, 8 T. R. (D. & E.) 209. See also *Rex v Oxford*, 2 Salk. 428; *Rex v Mayor, etc.*, 1 Lev. 291; *Rex v Coventry*, 1 Ld. Ray., 391; *Rex v Andover*, 1 Ld. Ray., 710.

⁴ *State v Common Council*, 9 Wis. 254. See also, *State v Kuehn*, 34 Wis. 229.

⁵ *People v Jewett*, 6 Cal. 291.

⁶ *People v Higgins*, 15 Ill. 110.

See also, *Mayor, etc. v Shaw*, 16 Ga. 172;

Clark v People, 15 Ill. 213;

Lowe v Comm., 3 Met. (Ky.) 237;

Dubuc v Voss, 19 La. Ann. 210;

Mead v Treasurer, 36 Mich. 416;

State v Jersey City, 25 N. J. L. 536;

State v Trenton, 50 N. J. L. 338;

Gardner v People, 62 N. Y. 299, aff'g 3 Hun (N. Y.) 222; 5 T. & C. (N. Y.) 678;

Comm. v Shaver, 3 W. & S. (Pa.) 338.

of the aldermen, and of elected officers by a two thirds vote; and that the latter should be removed only after notice, and a hearing upon charges; it was held, that the charter did not give the aldermen power to remove officers appointed for a specified term, without notice and a hearing; and that the general rule applied that such officers must always have such a notice and a hearing.¹

§ 363. **Statute requiring cause for removal cannot be evaded.**—Where a statute requires a board to appoint an officer, and to fix his term of office, and provides that he can be removed only for cause; the latter provision cannot be evaded by the appointment of the officer, without fixing his term, so as to leave him liable to removal at pleasure, whether the omission was made negligently or purposely: and where the officer has been thus appointed, his removal is void, unless it is made for cause.²

VII. Cases where a removal can be made, only upon notice to the officer, and hearing him in his defence.

§ 364. **When office held during good behavior or for fixed term, notice required.**—As already stated, this is the common law rule in all cases, except where an office is held, absolutely at pleasure. In this country, the rule is, that where an officer holds his office for a certain number of years, “if he shall so long behave himself well,” he cannot be removed, even for misbehavior, without notice and a hearing.³ So where he is appointed for a fixed term, and removable only for cause, he can be removed only upon charges, notice, and an opportunity to be heard.⁴ Thus, in Pennsylvania, where a statute

¹ Hallgren v Campbell, 82 Mich. 255.
See also, People v Therrieu, 80 Mich. 187.

² State v Police Com'rs, 88 Mo. 144, aff'g 14 Mo. App. 297.

³ Page v Hardin, 8 B. Mon. (Ky.) 648, at p. 672.

Contra, apparently, State v Doherty, 25 La. Ann. 119.

⁴ State v St. Louis, 90 Mo. 19.
See also, *post*, § 366 *et seq.*

provided, that the superintendent of common schools had "the power of removing any county superintendent, for neglect of duty, incompetency, or immorality;" it was held that a county superintendent could not be removed for any cause, except one of those enumerated in the statute; and that before he could be so removed, there must have been a charge against him, notice to him of the accusation, the hearing of evidence in support of it, and an opportunity given to him of making his defence.¹ The doctrine, that an officer can be removed only upon notice, and after a hearing, where the tenure of his office is during good behavior, or until removed for cause, or for a definite term, subject to be removed for cause, is recognized in other American cases, and may be regarded as settled law in this country.² And a removal, without notice and a hearing, in either of these cases, is erroneous and void.³ It was held, in Massachusetts, that a statute allowing a removal by the municipal boards, for such causes "as they may deem sufficient, and may assign in the order of removal," authorizes a removal without a hearing, but that a cause therefor must be assigned; and that an order, reciting that a communication was received from the superintendent, stating that he had discharged a subordinate for intoxication, and thereupon declaring that the superintendent's action was approved, is a sufficient removal.⁴

§ 365. Notice implies testimony and hearing; "explanation" does not.—Usually, a provision in the statute,

¹ Field v Comm., 32 Pa. St. 478.

² Dillon Mun. Corp., 4th ed., § 250 (*188.)

See also, Board of Aldermen v Darrow, 13 Colo. 460;

Madison v Korbly, 32 Ind. 74;

Stadler v Detroit, 13 Mich. 346;

Dullam v Willson, 53 Mich. 302;

State v St. Louis, 90 Mo. 19;

People v Brooklyn Com'rs, 106 N. Y. 64;

Hoboken v Gear, 27 N. J. L. 265;

Ex parte Hennen, 13 Pet. (U. S.) 230;

Kennard v Louisiana, 92 U. S. 480;

Foster v Kansas, 112 U. S. 201.

³ People v Brooklyn Com'rs, 106 N. Y. 64.

See also, People v Nichols, 79 N. Y. 582;

People v Brooklyn Com'rs, 103 N. Y. 370;

People v Health Dept., 24 Week. Dig. (N. Y.) 197.

⁴ O'Dowd v Boston, 149 Mass. 443.

requiring notice and a hearing, implies that testimony is to be produced in support of and against the charges. But this inference may be rebutted by the expression used in the statute. Thus, under the provision of the charter of the city of New York, declaring that each head of a department has power to remove his subordinates, but no regular clerk or chief of a bureau shall be removed "until he has been informed of the cause of the proposed removal, and has been allowed an opportunity of explanation; and in every case of removal the true grounds thereof, shall be forthwith entered upon the records of the departments;" it has been ruled that the officer, vested with the power of removal, is not required to take any evidence in support or in rebuttal of the charges; but the effect of the statute is merely to allow the officer whose removal is contemplated, to make such explanation as he deems proper, and refers the sufficiency thereof to the removing officer's judgment and discretion.¹ Neither the charge nor the explanation is required to be in writing.² When a statute provides, that the clerk of a court may be removed by the court, for misconduct in office, on conviction by a jury, as the court "shall think proper," the clerk cannot be removed without charges, and a finding by the jury, supporting some of them, which charges must be exhibited by the state through the prosecuting officer.³ A removal for mental disability is within a statute, requiring notice and a hearing.⁴

VIII. Causes which are or are not sufficient for the removal of an officer.

§ 366. **General principles as to statutory provisions.**—Where the statute allows a removal for "cause" only,

¹ *People v Thompson*, 94 N. Y. 451, aff'g 28 Hun (N. Y.) 28.

See also, *People v Fire Com'rs*, 72 N. Y. 445;

People v Mac Lean, 58 Hun (N. Y.) 152.

² *People v Campbell*, 50 N. Y. Super. Ct. 82.

³ *Callahan v State*, 2 Stew. & P. (Ala.) 379.

⁴ *People v Robb*, 55 Hun (N. Y.) 425.

See also, *ante*, § 357; *post*, §§ 374, 416.

and requires that the accused shall have notice and an opportunity for "explanation," and that the "true grounds" of the removal shall be entered upon the records, without specifying any particular act or omission, as sufficient cause for the removal; it has been held, that the "cause" for removal of an officer "is to be some dereliction or general neglect of duty, or incapacity to perform the duties, or some delinquency affecting his general character, and his fitness for the office. The cause assigned should be personal to himself, and implying an unfitness for the place, and, such cause being assigned, if unexplained, the removal may be made. An explanation may consist, either of excusing any delinquency, or apparent neglect or incapacity, that is, explaining the unfavorable appearances, or disproving the charges: that some other man is a better man than the accused, or more congenial to the appointing or removing power, is not a cause which the incumbent can explain, in the sense in which that term is used; and is no cause of removal within the statute."¹ But in another case it was held, that where the charter of a city provides that the council may remove a city officer "for cause," that does not create the council a tribunal, to hear and determine with respect to the cause of removal, nor require notice to be given to the officer; but allows the council to remove him for any cause, which is satisfactory to that body.² Where a removal can be made only for one of certain specified causes, the presumption is that it was made for one of such causes.³

¹ *People v Fire Com'rs*, 72 N. Y. 445, per Allen, J., p. 449.

See also, *People v Fire Com'rs*, 73 N. Y. 437;

People v Thompson, 94 N. Y. 451, aff'g 26 Hun (N. Y.) 28;

People v Grant, 12 Daly (N. Y.) 294;

State v Police Com'rs, 49 N. J. L. 170; *Haight v Love*, 39 N. J. L. 14.

² *Hoboken v Gear*, 27 N. J. L. 265. See also, *post*, § 396.

³ *State v Graham*, 25 La. Ann. 73. See also, *Dubuc v Voss*, 19 La. Ann. 210.

§ 367. When only official acts, etc., are grounds for removal; judicial officer not removable for mistake.—Where the constitution or a statute authorizes a removal for official misconduct, or misfeasance, misconduct, or maladministration in office, or similar acts of misbehavior in office, the general rule is, that the officer can be removed only for acts or omissions relating to the performance of his official duties, not for those which affect his general moral character, or his conduct as a man of business, apart from his conduct as an officer. In such a case, as a learned judge has remarked, it is necessary “to separate the character of the man from the character of the officer.”¹ But where such an official act or omission has occurred, the officer may be removed therefor, without reference to the question whether it was done maliciously or corruptly.² But it has been held that a mistake, made honestly and from ignorance of the proper steps in a judicial proceeding, will not justify the removal of a justice of the peace; as where he refused bail in a case of misdemeanor.³ And other cases establish the general rule, that a judicial officer is not liable to removal for an act which was not done corruptly.⁴ The practical application of these general rules, and the existence of some exceptions thereto, will appear in the cases cited in the following sections.

§ 368. Instances of “misconduct in office,” as sufficient causes.—It is misconduct in office, which renders the

¹ *Comm. v Chambers*, 1 J. J. Marsh. (Ky.) 103, per Underwood, J., p. 160.

See also, *Comm. v Barry*, Hardin (Ky.) 229;

Comm. v Williams, 79 Ky. 42.

² *Id.*

See also *State v Leach*, 60 Me. 58; *Minkler v State*, 14 Nebr. 181.

In each of these cases the court defines the expressions “misfeasance,”

“nonfeasance” and “malfeasance,” as used in constitutional or statutory provisions relating to the removal of officers.

³ *In re Thomas*, 2 N. Y. Supp. 38.

⁴ *State v Scates*, 43 Kan. 330.

See also, *Woods v Varnum*, 85 Cal. 639; and *post*, § 376.

officer liable to removal, where a county attorney refuses to prosecute for violations of the liquor law, because he believes that the public sentiment of the community is against the prosecution of such cases;¹ or where superintendents of the poor draw money from the treasurer for the relief of poor persons, and then compel the persons relieved to purchase therewith goods from themselves, or fail to refund money repaid by the persons relieved, or use their power to compel such persons to vote under their dictation;² or where a register of deeds falsely certifies that he has examined a title, and found it unincumbered;³ or where a county clerk refuses to act as clerk of the county commissioners, and withholds the official records, books, etc., from them, insisting that their contemplated action is unlawful.⁴

§ 369. “Disorderly behavior,” “malpractice in office,” and “neglect” as causes.—Where a statute authorized two thirds of a city council to expel a city officer, for “disorderly behavior, or malconduct in office,” it was held, on a judicial review of the action of the council in expelling the mayor, that the act was not justified, because he appointed as a police officer, a man under prosecution for resisting an officer.⁵ Where the common council of a city has power, by the charter, to expel a member for disorderly conduct, it may expel him for receiving a bribe for his official influence and vote, as that is “disorderly conduct,” within the meaning of the charter; but *semble*, that if he is reëlected, he cannot be expelled a second time for “the same identical offence.”⁶ Where the charter of a city authorized the mayor and city council to dismiss the marshal “for malpractice in

¹ *State v Foster*, 32 Kan. 14, aff'd, on a constitutional question only, 112 U. S. 201.

² *Gager v Supervisors*, 47 Mich. 167.

³ *State v Leach*, 60 Me. 58.

⁴ *State v Allen*, 5 Kan. 213.

⁵ *State v Teasdale*, 21 Fla. 652.

⁶ *State v Jersey City*, 25 N. J. L. 536.

See, however, *Comm. v Shaver*, 3 W. & S. (Pa.) 388; holding that bribery

office, or neglect of duty," it was held, that the word "malpractice" signified "some abuse of the duties of the marshal's office, as extortion, official malversation, or other such improper exercise of the office;" and "that gambling within the city was none of these things;" that it was not a "neglect of duty," since those words in the statute meant a neglect of official duty only, not of the duty of a good citizen; and accordingly that the proceedings of the mayor and council, removing the marshal upon the charge of gambling within the city were unauthorized.¹ But the supreme court of New York, in a case arising under the New York city police act, held that the police commissioners had the power, and it was their duty, to take notice of the conduct of members of the force, as well when they were off duty as when they were on duty; and that a policeman was properly removed for grossly immoral conduct, while he was off duty and not in uniform.² But where, by the charter of Newburgh, the mayor, with the consent of the common council, is empowered to remove the marshal for "incapacity or misbehavior, or neglect of duty;" this does not authorize his removal on the ground that he had previously been collector of taxes for the city, and had failed to account for and pay over money collected by him, since the statute refers to the conduct of the marshal, while filling that office.³

§ 370. **Intoxication as cause for removal.**—It has been held, that intoxication is not within a constitutional provision, providing for removal from office for "malfeas-

is not "disorderly conduct."
For other rulings, as to the effect of a reappointment or reelection, as a condonation of a former offence, see *post*, § 378.

this litigation, *Shaw v Macon*, 19 Ga. 468; *Shaw v Macon*, 21 Ga. 280; *Macon v Shaw's Adm'r*, 25 Ga. 590.

² *People v Police Com'rs*, 11 Hun (N. Y.) 403.

¹ *Macon v Shaw*, 16 Ga. 172.

See also the subsequent phases of

³ *People v Weygant*, 14 Hun (N. Y.) 546.

ance or misfeasance in office;" and a statute pronouncing it misfeasance, and providing for the removal of an officer (in this case a county judge), for that offence, is unconstitutional.¹ The contrary ruling was made in the case of the removal of a sheriff, under a constitutional provision, providing for removal for "crime, incapacity, or negligence."² But where public intoxication is made a crime, as by the New York excise act, and renders an officer ineligible to the police force, a policeman may be removed therefor.³ So it was held, that intoxication was a sufficient ground for the removal of a fireman, under a statute providing for removal in case of "misconduct or neglect of duty."⁴ Where a policeman was charged with intoxication, and his defence was, that he took the liquor by the advice of his physician, and for illness, and by mistake took too much; it was held, that the sufficiency of this defence rested in the judgment and discretion of the police commissioners, with the exercise of which the courts would not interfere.⁵ But to justify the dismissal of a policeman for intoxication, it must be shown that the intoxication was "conscious, voluntary, blamable, and in some way due to the officer's fault," although, in the absence of any proof in explanation, the mere fact of intoxication may establish the offence.⁶ And, in a case

¹ *Comm. v Williams*, 79 Ky. 42.

² *McComas v Krug*, 81 Ind. 327.

³ *People v French*, 102 N. Y. 583, aff'g 39 Hun (N. Y.) 507.

⁴ *People v Partridge*, 13 Abb. N. C. (N. Y.)

⁵ *People v French*, 52 Hun (N. Y.) 90, following 110 N. Y. 645.

See also *Rex v Taylor*, 3 Salk. 231;

People v French, 11 N. Y. St. Rep'r 577.

⁶ *People v French*, 119 N. Y. 502.

For other cases, where the dismissal of an officer for intoxication was in question, see *People v McClave*, 32 N.

Y. St. Rep'r 820; 10 N. Y. Supp. 560;

People v French, 32 N. Y. St. Rep'r 840;

10 N. Y. Supp. 860.

People v Mac Lean, 32 N. Y. St. Rep'r

844; 10 N. Y. Supp. 851;

People v French, 32 N. Y. St. Rep'r 190;

10 N. Y. Supp. 217;

People v French, 32 N. Y. St. Rep'r 444;

10 N. Y. Supp. 792;

People v French, 32 N. Y. St. Rep'r 557;

11 N. Y. Supp. 181;

People v McClave, 32 N. Y. St. Rep'r 434;

11 N. Y. Supp. 124;

A policeman is properly dismissed on the charge of being an habitual

where a similar defence was made by the accused, and it appeared that he had previously used intoxicating liquors to excess, and he was removed; it was held that intoxication was "conduct injurious to the public welfare" and "conduct unbecoming an officer;" and that the question whether he ought to be removed for that cause rested in the discretion of the board, and the courts would not interfere with their decision.¹ Where a police justice was charged with intoxication, it was held, that he was entitled to show in his defence, that he discharged his official duties honestly, impartially, and otherwise competently.² Under a statute, providing for the removal of a clerk for "misbehavior in office," as the court "shall think proper," it was held that the clerk might be removed, if he was intoxicated, while discharging the duties of his office, but not for intoxication at other times.³

§ 371. **Commission of crime without conviction as cause.**—Under a statute, allowing the removal of a policeman for "conduct unbecoming an officer, or other breach of discipline;" the supreme court of New York held, that a policeman could not be removed, upon the charge that he swore falsely upon the trial of another officer before the board of police commissioners, because that offence was made perjury by statute, and the officer must have been first convicted of the perjury in the ordinary criminal courts.⁴ But that decision was not followed, in a subsequent case under the same statute, where the same court held, that a policeman was properly removed under that statute, where he entered a saloon, under pretence

drunkard, and constantly under the influence of liquor. *People v French*, 29 N. Y. St. Rep'r 923; 8 N. Y. Supp. 874.

Chronic alcoholism is also a sufficient cause for removal. *People v Robb*, 32 N. Y. St. Rep'r 945; 10 N. Y. Supp. 867.

¹ *People v Fire Com'rs*, 82 N. Y. 358, rev'g 9 Week. Dig. (N. Y.) 390.

² *In re Grogan*, 24 N. Y. St. Rep'r 473; 5 N. Y. Supp. 499.

³ *Ledbetter v State*, 10 Ala. 241.

⁴ *People v Police Com'rs*, 20 Hun (N. Y.) 333.

that a burglary had been committed there, and broke open several boxes of cigars, and carried away the contents.¹ And it was said, in the latter case, that the board of police commissioners has power to examine into all offences committed by policemen, although they legally constitute crimes, and this for the purpose of purifying and disciplining the force. This decision was followed in a case, where the mayor removed a city officer, for having an interest in real property taken by the city, in violation of the statute, although the same statute made the act a misdemeanor.² And so it was held, that a police officer was properly removed, for an assault on a citizen, when off duty and not in uniform.³

§ 372. **Rulings as to other causes for removal of policemen.**—It has also been held, that each of the following acts constitute “conduct unbecoming an officer,” or “neglect of duty,” for which a policeman may properly be removed, to wit: falsely stating that one of his fellow officers had been guilty of a gravely immoral act, and attempting to procure a statement to that effect to be published in a newspaper;⁴ peddling cigars on commission, although not while on duty;⁵ failing to report an apparent crime, in violation of the rules of the department;⁶ leaving his post, and remaining in a private house nearly one hour, and also using offensive language to another officer, and threatening him with his club and revolver;⁷ absenting himself from his post to play cards during his term of patrol duty;⁸ taking a gratuity from a person arrested, for favor or indulgence;⁹ participating in

¹ *People v French*, 32 Hun (N. Y.) 112.

N. Y. Supp. 869.

² *People v Mayor, etc.*, 52 Hun (N. Y.) 483.

³ *People v Bell*, 24 N. Y. St. Rep'r 301; 3 N. Y. Supp. 812.

⁴ *People v Carroll*, 42 Hun (N. Y.) 438.

⁵ *People v Bell*, 3 N. Y. Supp. 314.

⁶ *People v Yonkers Police Com'rs*, 41 Hun (N. Y.) 389.

⁷ *People v Police Com'rs*, 93 N. Y. 97.

⁸ *People v Bell*, 24 N. Y. St. Rep'r 114; 4

⁹ *People v McClave*, 31 N. Y. St. Rep'r 246; 9 N. Y. Supp. 263.

an altercation at a station house;¹ using unnecessary violence towards a prisoner, amounting to maltreatment;² smoking, and drinking beer in a gate box (by a park policeman), while on duty.³ Closely akin to this kind of offence, is that of a violation by the officer of the rules established by the department; for instance, being absent without leave;⁴ failing to arrest while off duty;⁵ or being absent from his post while on duty.⁶ Firing a pistol in the air, to attract the attention of another officer, where the bullet hit a passing citizen, will not justify an officer's dismissal, on the charge of violating a rule against drawing a weapon on a citizen, except in self defence.⁷ Many of the cases cited in the preceding section arose upon charges of violating the rules.

§ 373. **Rulings as to other officers.**—Where a statute provided for the appointment of town railroad commissioners, and that if any commissioner should “refuse or wilfully neglect to perform any part of the duties,” his office should become vacant, and upon proof of the fact, to the satisfaction of the county judge, the latter should appoint a person in his place; and another portion of the statute provided, that the railroad stock to be acquired by the commissioners for the town, as provided in the act should, under certain circumstances be sold for cash; it was held that the vacancy could be created only by non-

¹ *People v Martin*, 29 N. Y. St. Rep'r 369; 8 N. Y. Supp. 518, aff'd (no op'n) 121 N. Y. 676;

People v Police Com'rs, 32 N. Y. St. Rep'r 824; 10 N. Y. Supp. 764;

² *People v Bell*, 32 N. Y. St. Rep'r 914; 10 N. Y. Supp. 829.

³ *People v Robb*, 29 N. Y. St. Rep'r 59; 8 N. Y. Supp. 418.

See also *People v Robb*, 31 N. Y. St. Rep'r 640; 9 N. Y. Supp. 831.

⁴ *People v Yonkers Police Com'rs*, 121 N. Y. 716, rev'g 55 Hun (N. Y.) 445;

People v Mac Lean, 32 N. Y. St. Rep'r 838; 11 N. Y. Supp. 110;

People v French, 31 N. Y. St. Rep'r 87; 9 N. Y. Supp. 262.

⁵ *People v Bell*, 29 N. Y. St. Rep'r 551; 8 N. Y. Supp. 748;

⁶ *People v Mac Lean*, 57 Hun (N. Y.) 141. This case holds that the charge cannot be maintained, without proof that the officer was on duty at the time.

⁷ *People v Mac Lean*, 29 N. Y. St. Rep'r 108; 8 N. Y. Supp. 511; aff'd (no op'n) 121 N. Y. 704.

feasance; and that an order of the county judge, declaring the offices of the commissioners vacant, and appointing others in their places, on the ground that they had sold the stock on credit, recited a misfeasance, and was unauthorized by the statute.¹ A county treasurer is properly removed, for failing to make the returns or reports required by law.²

§ 374. **Inefficiency or incapacity as cause.**—While an officer may undoubtedly be removed for inefficiency or incapacity, yet he cannot lawfully be removed, where there are no specific charges against his own efficiency or capacity, but simply a charge that the duties pertaining to his office can be more efficiently performed by another person.³ A rule of the New York fire department, making its members responsible for any want of judgment or skill, or any neglect or failure, “which may cause unnecessary loss of life, limb, or property,” does not authorize the removal of an officer for want of judgment or skill, which does not actually produce any loss.* Where an officer accepts an additional charge, involving duties of the same general character as those which he already discharges, although he may lawfully decline the added duties, yet if, having accepted them, he proves to be inefficient and negligent in the discharge thereof, he may be removed from his office for that cause; but he cannot be made responsible for the inefficiency or incapacity of assistants, whom he had no power to appoint, although he advised and instructed them in the performance of their duties.* Under a statute, authorizing removal by the board of police, “provided good cause shall be shown” “after an

¹ *People v Burnside*, 3 Lans. (N. Y.) 74.

² *People v Fire Com'rs* 12 Hun (N. Y.) 500.

³ *Randolph v Pope Co.*, 19 Ill. App. 100;
State v Hay, Wright (Ohio) 96.

⁴ *People v Fire Com'rs*, 106 N. Y. 257,
aff'g 43 Hun (N. Y.) 554.

⁵ *People v Campbell*, 82 N. Y. 247.

investigation by such board;" the removal of a policeman upon a report of physical incapacity, made by a physician, under the direction of the board of police commissioners, and after hearing testimony, is made for sufficient cause, and in proper form.¹ And a statute allowing a suspension of pay for absence, on account of sickness, "physical or mental," does not restrict a power, previously conferred, to remove at pleasure; so that a dismissal for mental incapacity, upon a physician's report, without notice or hearing, is valid.²

§ 375. **Grounds of removal of a sheriff.**—A sheriff cannot be removed by information, for permitting a prisoner to go at large, without paying the fine and costs; the proceeding must be by indictment.³ The misconduct of a deputy sheriff is not a good ground for removing the sheriff, where there is no evidence that he sanctioned it.⁴

§ 376. **Grounds of removal of clerk of court.**—An overcharge of fees by the clerk of a court, not made corruptly, is not a sufficient cause of removal; but permitting a replevin bond to be altered, after it has been filed, or erasing the name of a person, returned by the sheriff on a panel of grand jurors, is sufficient.⁵ So an honest error in exacting his fees before performance of the service, or a refusal to obey a statute of doubtful constitutionality, or permitting a person to act as deputy without taking an oath of office, if done without corrupt motives, is not a sufficient cause for the removal of a clerk.⁶ But the failure of a clerk to produce, at the prescribed term of the

¹ *State v Police Com'rs*, 49 N. J. L. 170.
See, however, *Hazard's case*, 2 Rolle 11.

² *People v Robb*, 126 N. Y. 180; overruling, *semble*, *People v Robb*, 55 Hun (N. Y.) 425. See also, *ante*, §§ 357, 365.

³ *Haskins v State*, 47 Ark. 243.

⁴ *State v Budd*, 39 La Ann. 232.

⁵ *Comm. v Barry*, Hard. (Ky.) 229.
See also *Comm. v Chambers*, 1 J. J. Marsh. (Ky.) 108 and *ante*, § 367.

⁶ *Comm. v Arnold*, 3 Litt. (Ky.) 309. The opinion, in this case, disposed of fifteen charges, *serialim*.

court, the receipt of the treasurer for money collected by him is a sufficient cause for his removal.¹

§ 377. **Clerk allowing violation of fire regulations.**—The chief clerk in the bureau of the inspector of buildings in the city of New York cannot rightfully be removed, by the fire commissioners, because he gave oral permission to an applicant, to proceed with some additions and alterations in a frame building, until the inspector should decide upon the application, where the inspector had authorized him so to act in a case of urgency; although the power to grant the permission was vested in the inspector alone, and could not be delegated by him, and the permission given resulted in a violation of the fire regulations.²

§ 378. **Reappointment or reelection a bar to removal.**—The reappointment of an officer, with knowledge of his previous misconduct in a matter not involving moral delinquency, is a condonation thereof, as respects the right of the appointing power to remove him therefor.³ And it has been said, that a board of aldermen of a city, having power to expel a member for cause, cannot deprive him of his seat for a cause affecting his eligibility, which existed at the time of his election;⁴ and that where a member has been expelled on the charge of receiving a bribe, if he is reëlected, he cannot be expelled the second time for the same offence.⁵ Where the charter of a city provides, that the city council “shall be the sole judge of the election returns and qualification of its own members,” a provision, which, as the court decided in a former case, makes them not only a board of canvassers, but a tribunal with power to go back of the canvass, and determine who

¹ *Sevier v Justices*, Peck (Tenn.) 334.

⁴ *Ellison v Raleigh*, 89 N. C. 125.

² *People v Fire Com'rs*, 96 N. Y. 672,
rev'g 49 N. Y. Super. Ct. 369.

See also *Doyle v Raleigh*, 89 N. C. 133.

⁵ *State v Jersey City*, 25 N. J. L. 536.

³ *State v Common Council*, 9 Wis. 254.

is entitled to be seated; they cannot, after having once investigated a contested election, and seated a member, order, at a subsequent meeting, a second investigation of the same matter. The right to reconsider is restricted, at least in such a case as this, to the same meeting where the result was determined, unless a motion to reconsider is then made, and held over for future action.¹

IX. Legal sufficiency of the proceedings to remove an officer, where the removal can be made only for cause, and after notice and a hearing.

(1.) GENERAL RULES RELATING TO PROCEEDINGS OF THIS CHARACTER.

§ 379. **Proceeding judicial in character.**—Where the statute provides that an officer may be removed, but “only for cause and after an opportunity to be heard,” the power thus granted “is not an arbitrary one, to be exercised at pleasure, but only upon just and reasonable grounds, and then not until after notice to the person charged, for in no other way could he have ‘an opportunity to be heard.’ The proceeding, therefore, must be instituted upon specific charges, sufficient in their nature to warrant the removal; and then, unless admitted, proven to be true.” The person charged has also the right to “cross-examine the witnesses produced to support the charges, call others in his defence, and in these and other steps in the proceeding be represented by counsel. In no other way could the person sought to be removed have a due hearing, or ‘an opportunity to be heard,’ and this condition must be complied with before the power of removal is exercised. It follows, therefore, that the proceeding is judicial in its character, and as a necessary

¹ State v Camden, 47 N. J. L. 64; explaining State v Foster, 7 N. J. L. 101, and following Lantz v Hights-

town, 46 N. J. L. 102; Hadley v Mayor, etc., 33 N. Y. 603; and Morgan v Quackenbush, 22 Barb. (N. Y.) 72.

consequence, is subject to review by a writ of certiorari issued by the supreme court, in the exercise of its superintending power over inferior tribunals and persons exercising judicial functions.”¹ And, inasmuch as the proceeding is judicial, if one of the members of the board, who is interested in the subject of the complaint, is present, and his presence is necessary in order to make a quorum, the removal is void.²

§ 380. **Proceeding not a “common law trial.”**—But the proceeding is not a “common law trial, with the incidents and common law rights pertaining to such a trial, nor strictly speaking, a trial before a court.” It is “an investigation required by the statute in such cases, to furnish information” to the removing power, upon which it may act in removing the person, against whom the charges are made.³ The right to a fair trial does not give the party the right to insist on the formalities, necessary in criminal trials.⁴ And the same precision and accuracy as upon a trial at common law is not required in these proceedings: it suffices that the substance thereof should be fairly preserved.⁵ “While the commissioners” (the police commissioners of New York city) “have not full power to discharge or dismiss an officer at their own volition, and without cause, or without a charge being made and a trial had, yet, in the exercise of their functions, they are, to some extent, vested with a discretionary power, which authorizes them, within established rules, to take action without restricting their proceedings

¹ *People v Nichols*, 79 N. Y. 582, rev'g 18 Hun (N. Y.) 530.

See also, *Dullam v Willson*, 53 Mich. 392;

People v Fire Com'rs, 72 N. Y. 445;

People v Hannan, 56 Hun (N. Y.) 469;

People v Whittemore, 27 Week. Dig. (N. Y.) 213;

And *post*, Division X.

² *Stockwell v Township Board*, 22 Mich. 341.

See, however, *People v Police Com'rs*, 10 Hun (N. Y.) 106; *aff'd* 76 N. Y. 613, cited *post*, § 390.

³ *People v Police Com'rs*, 98 N. Y. 332.

⁴ *State v Police Com'rs*, 49 N. J. L. 170;

⁵ *People v McClave*, 123 N. Y. 512.

to strict technical rules. They are a subordinate and an administrative tribunal, vested with disciplinary powers, and not a court, limited in its functions, within the provisions of the constitution. Their action must be considered, having in view the special powers conferred, and the purposes for which their organization was intended, and not confined by the application of strict legal rules, which prevail in reference to trials and proceedings at common law.”¹ But there can be no removal, unless the charge is established by evidence, although the accused, without denying the charge, requested a postponement, which was denied.² And the evidence must establish all the essential parts of the offence charged. Thus, an officer cannot lawfully be removed for absence from his post, while on duty, if there is no proof, that he was on duty at the time.³ In determining the question of the guilt of the accused, the members of the board may not act upon their own knowledge, but must act upon the evidence only, although, in inflicting the punishment, they may take into consideration their knowledge of the officer.⁴

(2.) SUFFICIENCY OF THE NOTICE AND OF THE STATEMENT
OF THE CHARGES.

§ 381. **Actual service of notice, and certainty in charges required.**—Under the New York city police act, it was held, that a member of the force, upon proceedings to remove him, is entitled to actual notice; and that where a notice was left at the station house with another officer, who promised to deliver it to him, and subsequently made an affidavit of service upon him, on which he was removed, but in fact he never received it; the

¹ *People v Police Com'rs*, 93 N. Y. 97.

See also, *People v Ennis*, 27 N. Y. St. Rep'r 276.

² *People v Fire and Building Com'rs*, 26 N. Y. St. Rep'r 648; 7 N. Y. Supp. 439.

³ *People v MacLean*, 57 Hun (N. Y.) 141.

⁴ *People v French*, 119 N. Y. 502.

proceeding to remove him was erroneous, and would be set aside on certiorari.¹ Under the provision of the charter of New York city, forbidding the removal of any one of certain subordinate city officers "until he has been informed of the cause of the proposed removal, and has been allowed an opportunity of explanation;" it is not requisite that the charges and specifications should be drawn with the formal exactness of pleadings in a court of justice; and the question, as to the reasonableness of the time allowed for explanation, rests to a great extent in the discretion of the head of the department; and where it does not appear that the discretion has been abused, a refusal to give further time furnishes no ground for a reversal of his decision.

§ 382. "Reasonable notice;" when specification sufficient.—In one case, where "reasonable notice" was required by the statute, it was held, that personal service of a notice, "more than twenty-four hours" before the time appointed for the trial, sufficed. With respect to the sufficiency of the statement of the charges, the court said: "It is not required that the commissioners should do more than specify in writing the offence with which the person is charged; and any language, which conveys that information, enables him to prepare for trial, and thus answers the purpose sought to be effected, by the provision of law referred to."² A notice to the officer "to show cause why he should not be removed," specifying no cause, is a nullity.³ It is not necessary that the charge should be in the language of the statute, or of the rules established by the board under the authority of the statute; if the substance of the cause of the proposed

¹ *People v Board of Police*, 3 Abb. App. Dec. (N. Y.) 488.

See also, *People v Campbell*, 50 N. Y. Super. Ct. 82.

² *People v Thompson*, 94 N. Y. 451, aff'g 26 Hun (N. Y.) 28.

³ *People v Fire Com'rs*, 77 N. Y. 153.

⁴ *People v Fire Com'rs*, 72 N. Y. 445.

removal is stated, that suffices.¹ It is only necessary that the charge should inform the officer of what he is accused, and that the facts charged should show a proper cause for removal; a reference to the statute is not required.² But it must specify the cause with sufficient particularity, to enable the person to make his defence; a general charge of incompetency is not sufficient. "The best of clerks may become incompetent, with or without his fault, and such incompetency may be sufficient ground for removal, in order to protect the public interests; but he is entitled to have the kind and nature of his incompetency stated, and to have, upon such statement, an opportunity for explanation."³ The "cause of removal" of a county clerk, required by statute to be specified, is sufficiently stated in a charge, that he refused to affix the county seal to certain instruments, and in the order of removal, that he is removed for "official misconduct and wilful neglect of duty."⁴

§ 383. **Removal for cause not specified invalid.**—An officer cannot be removed, where charges are required, for any offence not particularly stated in the charges.⁵ And where the charge was the use of vile language and neglect of duty, but the officer was convicted of incompetency, and of using language unbecoming an officer while his trial was pending, his conviction and removal were reversed on certiorari.⁶

§ 384. **Non-verification of charge, when no defence.**—Where the rules of the police department of New York city, established under the authority of the statute, required all charges against an officer to be verified by

¹ *People v Carroll*, 42 Hun (N. Y.) 433.

500, cited *ante*, § 374.

² *People v Fire Com'rs*, 3 N. Y. St. Rep'r 144;

⁴ *State v McCarty*, 65 Wis. 163.

³ *People v Starks*, 33 Hun (N. Y.) 384.

⁵ *Comm. v Arnold*, 3 Litt. (Ky.) 309.

See also, *People v Fire Com'rs*, 12 Hun

⁶ *People v Doolittle*, 44 Hun (N. Y.) 293.

affidavit, unless they were made by a captain; it was held that the objection, that the charges were made by a roundsman, and were not so verified, was untenable, if they were in fact made by a captain, although the roundsman appeared therein as the complainant.¹

(3.) TAKING THE TESTIMONY, AND OTHER PROCEEDINGS
UPON THE TRIAL OR HEARING.

§ 385. **Rights of accused at trial or hearing.**—As we have already shown, where the statute requires, expressly or impliedly, a hearing or trial, as distinguished from a mere “explanation,” the charges must be proven by testimony, and the accused has the right to cross-examine the witnesses produced to sustain them, to produce witnesses in his defence, and to be assisted by counsel.² It is not essential, that the testimony should be taken before all or a quorum of the members of the board, which is to act upon it; it may be taken by a stenographer, in the presence and under the direction of one of the members, and afterwards written out and submitted to the board, so as to form the basis of the judgment of the board;³ and the validity of the removal is not affected by the fact that the member, under whose direction it was taken, was not present, when it was so submitted and acted upon by the board; or that he had then ceased to be a member of the board.⁴

¹ *People v French*, 23 N. Y. St. Rep'r 384; 5 N. Y. Supp. 57.

² *Ante*, § 379.

It was held, in one case, that the party has the right to be represented by counsel, even in making the “explanation” provided for by the New York city charter.

In re Emmet, 65 How. Pr. (N. Y.) 266.

³ *People v Police Com'rs*, 93 N. Y. 97; *People v Police Com'rs*, 98 N. Y. 332;

People v Police Com'rs, 99 N. Y. 676;

People v McClave, 123 N. Y. 512.

Contra, apparently, *Jacksonville v Allen*, 25 Ill. App. 54.

⁴ *People v Police Com'rs*, 98 N. Y. 332; *People v Police Com'rs*, 23 Hun (N. Y.) 351;

People v Police Com'rs, 27 Hun (N. Y.) 462;

People v Police Com'rs, 31 Hun (N. Y.) 209.

§ 386. **Quorum of board only required; adjournments; refusing testimony.**—It is not necessary that the testimony should be examined, and the decision pronounced, by all the members of the board; it suffices that the testimony should be laid before, and examined and acted upon by, the members constituting the board, at a regular meeting thereof, when a majority is present;¹ and the proceedings may be adjourned, after a portion of the hearing is completed, and continued at the adjourned meeting.² But where a statute provides that a city officer shall be subject “after hearing, to removal at any time by the mayor, by and with the advice and consent of the aldermen, for inefficiency or other cause;” the hearing must be by the mayor and aldermen, and not the aldermen alone; and both must find that sufficient cause for the removal exists, and must so adjudicate, before there can be a valid removal.³ On the hearing of charges against a policeman, where the commissioner in charge arbitrarily set aside a witness called by the officer, saying that he did not want his testimony; the order of removal was set aside; the commissioner in charge is not justified in arbitrarily rejecting a witness, offered by the officer on trial, without hearing his testimony, because developments during the trial have affected his credibility.⁴ But where a policeman on trial requested to be allowed to call certain witnesses, who were not present, and was informed by the commissioner that they would not be examined, it was held that no error had been committed, inasmuch as the persons named were not present.⁵

¹ *People v Police Com'rs*, 99 N. Y. 676, aff'g 31 Hun (N. Y.) 40.

the aldermen alone did not confer jurisdiction.

² *Id.*

⁴ *People v French*, 51 Hun (N. Y.) 427.

³ *Andrews v King*, 77 Me. 224. It was also held, that the officer's consent that the hearing should be before

⁵ *People v French*, 25 N. Y. St. Rep'r 536; 6 N. Y. Supp. 213.

§ 387. **Effect of board acting during officer's absence.**— Under the provision of the charter of New York, requiring notice and an “opportunity of making an explanation,” before one of certain officers can be removed, where such an officer was notified to appear, and show cause why he should not be removed; and while on his way to appear, at the time and place specified, for the purpose of making the explanation, he was suddenly attacked by a violent illness, rendering it impossible for him so to appear; and he immediately communicated this fact to the board, so that it reached the board before its meeting, but the board made no inquiry, and proceeded to remove him; the proceedings were reversed on certiorari, the court holding that the board had acted without allowing an opportunity for an explanation, within the true intent and meaning of the statute.¹

(4.) WAIVER OF HIS RIGHTS BY THE ACCUSED, AND EFFECT THEREOF.

§ 388. **What is a waiver; when may be withdrawn.**— It was held, in a case heretofore cited, that where an officer, who was entitled to notice and an opportunity to defend himself, before he could lawfully be removed, had received no notice; but was present when the resolution of removal was presented, and, without asking delay, proceeded to defend himself, he had waived a formal notice, and the removal was valid.² Substantially the same ruling was made, in a case, arising under the police act relating to New York city.³ And in another case, it was stated, that the rule is, that where the removing officer or board has jurisdiction of the charge, he or it obtains jurisdiction over the officer by his appearance, without objection, in answer to the charge.⁴ Where,

¹ *People v Starks*, 33 Hun (N. Y.) 384.

aff'g 39 Hun (N. Y.) 507.

² *Willard's appeal*, 4 R. I. 595, cited *ante*, § 354.

³ *People v Carroll*, 42 Hun (N. Y.) 438.

See also, *People v Campbell*, 50 N. Y. Super. Ct. 82.

⁴ *People v Police Com'rs*, 102 N. Y. 583,

upon charges being made against a policeman of the city of New York, he indorsed upon the notice and signed an admission of the truth of the charges, and a waiver of a trial thereupon; but before the day appointed for the hearing, he presented to the board a statement under oath, in which he withdrew the admission, and revoked the waiver, denied and fully answered the charges, and explained the circumstances under which the indorsement was made, but he did not appear upon the hearing; whereupon the board removed him, without other proof than his admission; it was held that he was not estopped by the admission and waiver, as the paper was not given to the board as his answer to the charge, and was revocable; and that he was therefore illegally removed.¹ And an appearance by the accused before the commissioners, his failure to deny the charges, and his request of a postponement, which was denied, do not constitute such a waiver of his rights, that an order of removal, without taking any testimony, can be sustained.² But a removal will not be set aside, because the officer removed was required to testify against himself, if he objected to so doing, until a case had been made out against him.³ And one who, being charged with an offence, presents his resignation, cannot review upon certiorari the proceedings for his removal.⁴

(5.) DECISION, AND EFFECT THEREOF.

§ 389. **When decision valid; notice thereof required; majority vote suffices.**—It is necessary to cite here only a few of the authorities, relating to the decision and the effect thereof, because that subject has already been incidentally considered, in connection with the testimony and the hearing, and will be further considered in the next succeeding division of this chapter, relating to the

¹ *People v Police Com'rs*, 67 N. Y. 475, rev'g 6 Hun (N. Y.) 229.

³ *People v McClave*, 123 N. Y. 512.

⁴ *People v Martin*, 32 N. Y. St. Rep'r 543; 10 N. Y. Supp. 511.

² *Ante*, § 380.

review of the proceedings by the courts. It has been held, that where the board of police commissioners of the city of New York had passed judgment, removing a policeman, before the testimony taken before one of them had been written out and submitted to the board, the error is cured by subsequently causing the testimony to be written out and examined, and pronouncing judgment anew thereupon.¹ Where the statute provides that a policeman shall be removed, on his attaining the age of sixty years, the board has no discretion, as in other cases, but it is bound to remove an officer who has attained that age.² Where the board of fire commissioners sentenced an offending fireman "to be retired from active service, on an annuity of one hundred and fifty dollars;" it was held, that as the board had the power of removal, the sentence took effect as such, although, as it had no power to grant the annuity, that part of the judgment was void.³ And it has been held, that an officer is not deprived by his removal of power to execute his office, until he has had notice thereof;⁴ and that, until such notice, he is entitled to his salary.⁵ Where power is given by statute to a city council to remove an officer, he may be removed by a majority vote.⁶

§ 390. **Ruling where charge relates to member of board.**—Where a policeman of the city of New York was tried, upon charges, preferred by his captain and sergeant, of neglect of duty in failing to arrest two men fighting in the street, and of conduct unbecoming an officer, in using improper language to police commissioner E, when

¹ *People v French*, 2 N. Y. St. Rep'r 608.

² *People v French*, 13 N. Y. St. Rep'r 584.
See also, *ante*, § 342.

³ *Wood v Mayor, etc.*, 44 N. Y. Super. Ct. 321.

⁴ *Comm. v Slifer*, 25 Pa. St. 23. This ruling appears to be opposed to the

weight of authority. See *ante*, § 354, *note*.

⁵ *Jarvis v Mayor, etc.*, 2 N. Y. Leg. Obs. 396.

⁶ *Madison v Korbly*, 32 Ind. 74;
Madison v Kelso, 32 Ind. 79.

reproved therefor; and, being brought before commissioner E for trial, he was sworn, and testified relating to the charges, but no other witnesses were examined; and, at a meeting of the board, commissioner E made his report, and the board found the officer guilty of neglect of duty in not arresting the men, commissioner E not voting; it was held that as E was not the complainant, and was not examined as a witness, he was not incapacitated from taking and reporting the testimony, and the removal was valid. And the court said, that even if E had been the complainant, as the act would have been in the line of his duty, that would not necessarily have disqualified him from investigating the charges.¹

X. Review by the courts of the proceedings for the removal of an officer.

§ 391. **General observations.**—It is not the province of this work, to treat exhaustively of the functions of the different writs for the review of proceedings of this character; the cases where a particular writ will or will not lie; or the mode of procedure thereunder. These are regulated by rules applicable to this class of cases, in common with all others wherein remedies may be thus obtained, and form the subject of numerous treatises, devoted specially to those subjects. A glance at the different modes of review, and the citation of such decisions, as relate specially to the review of the proceedings for the removal of a public officer, are all that will be required here. A more particular examination of the subject will be found in another chapter.²

§ 392. **Procedure where no jurisdiction to remove existed.**—Where the proceedings to remove an officer were wholly without jurisdiction, that is, where the

¹ *People v Police Com'rs*, 10 Hun (N. Y.) 106; *aff'd* on opinion below, 76 N. Y. 613. ² *Post*, ch. 31.

removal was made by an officer or a board not possessing the power to remove, or without notice or a hearing or the assignment of a cause, in a case where the statute requires the proceedings to be thus taken; and where the record of the proceedings shows upon its face such want of jurisdiction; the removal may in some cases be treated as a nullity, where its validity is collaterally called in question; or the proceedings may be reviewed, by an information in the nature of a quo warranto,¹ or in some cases by the writ of mandamus,² or the writ of prohibition. Where the order for the removal takes the form of an adjudication by a court of record, it may be reviewed by writ of error.³ It is not the province of a court of equity, to interfere, in cases involving merely the question of title to an office; and accordingly an injunction will not lie, either against the removing officer or body, to prevent the removal, or against the person appointed in place of the officer removed, to prevent him from exercising the duties of the office.⁴ The most common mode of reviewing the proceedings for the removal of an officer is by certiorari, which reaches, not only want of jurisdiction, but errors of law in the proceedings, as will be seen by the cases hereinafter cited.

§ 393. **General rules as to power to review.**—The general rules, respecting the power of the courts to review proceedings of this character, were well stated by the

¹ *State v Lupton*, 64 Mo. 415. But it has been said, that where the governor removes an officer under a statute he acts administratively, and his action cannot be reviewed by quo warranto. *State v Hawkins*, 44 Ohio St. 98.

² *Hawkins v Kercheval*, 10 Lea (Tenn.) 535. Accord, *Street v County Com'rs*, 1 Ill. 25.

See also, *Ex parte Thatcher*, 7 Ill. 187.

³ *Callahan v State*, 2 Stew. & P. (Ala.) 379.

⁴ *Muhler v Hedekin*, 119 Ind. 481.

See also, *Beebe v Robinson*, 52 Ala. 66; *Delahanty v Warner*, 75 Ill. 185; *Tappan v Gray*, 9 Paige (N. Y.) 507; and *post*, § 850.

court of queen's bench, in a case wherein it was ruled, that although the corporation of the city of London has, by statute, power to remove one of its officers holding a freehold office, the court of queen's bench will see that the power is exercised in a lawful manner, and will interfere if it should not be so. But if it is exercised in a lawful manner, the court will not interfere, on the ground that it has not been wisely or discreetly exercised in the particular case; and if it is exercised upon an allegation of inability or neglect of duty, if such evidence was given, that a judge, upon an ordinary trial, might properly leave it to the jury to say, whether the accusation was made out, the court will not interfere. And the corporation can lawfully appoint a committee to examine into the complaint, and to receive evidence and report thereupon, and may remove the officer upon the report and evidence.¹

§ 394. **Courts will not interfere, if removing body vested with discretion.**—It is well settled, that where the removing officer or body is vested with a discretion in the particular case, the courts will not interfere with the exercise of that discretion. Thus, as was stated in a previous section, where an officer is removed because his services are no longer needed, or to diminish the expenses, or for similar reasons resting in the discretion of the removing authority, he has no remedy in the courts.² So, where the proceedings have been taken in accordance with the statute, and the cause alleged is one for which the officer may be removed, but the proof shows that the delinquency was in a small matter; it is for the removing

¹ *Osgood v Nelson*, 41 L. J., Q. B., 329; 5 L. R., H. L. 636.

See also, *Reg. v Smith*, 5 Q. B. 614. It will be noted here, that the common law rule, as laid down in the English courts, is that in all cases, except where the office is held at

pleasure, an officer can be removed only upon charges, and after notice. *Ante*, § 362.

² *Ante*, § 347.

See also, *People v Police Ccm'rs*, 20 Week. Dig. (N. Y.) 552

officers to determine, whether the delinquency was sufficiently grave to require the removal; and the courts will not interfere, because the punishment seems to be disproportionate to the offence.¹ So, where the charter of a city provided, that the officers of the fire department should retain their positions, as long as they discharged their duties properly “and satisfactorily to the said fire commissioners,” and should not be removed for political sentiments, etc., it was held, that the statute vested the fire commissioners with the sole power to determine, whether a cause for removal had occurred; that the matter rested in their own discretion and judgment, which could not be reviewed by an appeal to any other tribunal; and that a mandamus to restore a removed officer will not lie, where the power of removal rests in discretion, or depends upon the exercise of personal judgment, even if it was exercised maliciously or dishonestly; but in the latter case the commissioners will be answerable for corrupt action.² So, the courts will not review the exercise of a power of removal, where, in the opinion of the board vested with such power, the misconduct was sufficient for removal, “except in the clearest case of abuse.”³

§ 395. Sufficiency of an “explanation,” is matter of discretion.—Under the provision of the charter of the city of New York, prohibiting the removal of certain subordinates, until the person proposed to be removed, “has been informed” of the cause, and “has been allowed an opportunity of explanation;” it was held that the head of the department may remove a subordinate, after having heard his “explanation,” if the same is not satisfactory

¹ *People v Grant*, 12 Daly (N. Y.) 294.

² *State v Register*, 59 Md. 283.

Several other cases, where it was held that a decision could not be reviewed,

where the matter rested in discretion, are cited in the foregoing sections of this chapter.

³ *State v Prince*, 45 Wis. 610.

to him, without calling witnesses or allowing the subordinate to do so; that he may exercise the power, upon facts within his own knowledge, or upon information derived from others; that his decision respecting the removal is final and conclusive, and cannot be reviewed by the courts; and that the question, whether he gave a reasonable time to the subordinate for his explanation, and the extent to which the explanation should be allowed to go, rested to a great extent in his discretion, and could not be reviewed by the courts, in the absence of proof that the discretion was abused.¹

§ 396. **Power of removal "for cause" vests discretion.**—So it has been held, that where a statute gives a power of removal "for cause," without any specification of the causes, this power is of a discretionary and judicial nature; and unless the statute otherwise specially provides, the exercise thereof cannot be reviewed by any other tribunal, with respect either to the cause, or to its sufficiency or existence, or otherwise.² Under similar statutory provisions, and even in some cases where the statute specifies the causes of removal, it has been ruled, in other American decisions, that the removing authority is the sole and exclusive judge of the cause, and the sufficiency thereof; and that the courts cannot review its decision in any case where it had jurisdiction.³

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¹ *People v Thompson*, 94 N. Y. 451, aff'g 26 Hun (N. Y.) 28.

² *People v Stout*, 11 Abb. Pr. (N. Y.) 17; 19 How. Pr. (N. Y.) 171. Approved and followed, *People v Bearfield*, 35 Barb. (N. Y.) 254.

A more restricted meaning to the words "for cause," where the statute also provides for a notice and a hearing, has been given in subsequent decisions in the same state. See

ante, § 386.

³ *Patton v Vaughan*, 39 Ark. 211; *United States v Oliver*, 6 Mackey (D. C.) 47; *Oliver v Americus*, 69 Ga. 165; *State v Ramos*, 10 La. Ann. 420; *State v Doherty*, 25 La. Ann. 119; *Hamtramck v Holihan*, 46 Mich. 127; *Gager v Supervisors*, 47 Mich. 167; *Hoboken v Gear*, 27 N. J. L. 265; *State v Hawkins*, 44 Ohio St. 98.

§ 397. Courts have jurisdiction to review, although body made judges of election, etc., of members.—It has been held, that where a statute declares that the common council of a city, or any other body of officers, shall be the “judges of the qualifications, elections, and returns of their own members,” the body referred to has exclusive authority upon that subject, and that the courts have no jurisdiction to inquire into the qualification, election, etc., of any member thereof.¹ But the weight of authority is decidedly in favor of the rule, that such a provision is cumulative only, and does not oust the courts of their power to determine any such controversy, notwithstanding the decision of the body so empowered, unless the statute expressly declares that the body shall be exclusively or finally the judge of the controversy.² And it was ruled, that where a statute makes the council of a municipal corporation the exclusive judge of the election of its members, an information in the nature of a quo warranto will lie against a person, who assumes to exercise the office of member of the council, from a ward having no lawful existence, or under an election held without lawful authority.³ Generally, the state constitution declares that each house of the legislature shall have such final and exclusive power; but in the absence of any provision on the subject, or where there is no express declaration that the power shall be exclusive, public policy requires that those bodies should constitute exceptions to the rule, that the courts may review their proceedings, in determining the

¹ *People v Metzker*, 47 Cal. 524;
People v Harshaw, 60 Mich. 200.

² *People v Londoner*, 13 Colo. 303;
B'd of Aldermen v Darrow, 13 Colo. 460;
State v Gates, 35 Minn. 385;
People v Hall, 80 N. Y. 117;
McVeany v Mayor, etc., 80 N. Y. 185,
 and cases there cited;

State v Kempf, 69 Wis. 470.
 Accord, *People v Bingham*, 82 Cal. 238,
 explaining, and practically overruling,
People v Metzker, 47 Cal. 524,
 cited in the last preceding note.

³ *State v O'Brien*, 47 Ohio St. 484;
State v Kearns, 47 Ohio St. 566.

title of a person to a seat therein.¹ But such a constitutional provision does not prevent the legislature from inflicting by statute a disqualification to hold office, as a punishment for crime.²

§ 398. **What considered upon proceedings to review.**—

It has been settled, by numerous American decisions, chiefly those which have been made by the courts of New York, under the statute regulating the removal of municipal officers, that where an officer can be removed only upon charges, and after notice and an opportunity to be heard, the proceedings to remove him are judicial in their character, and are subject to review by a writ of certiorari, issued out of the supreme court in the exercise of its general superintending power over inferior tribunals, and persons exercising judicial functions.³ Upon such a certiorari, only errors of law can be considered, which materially affect the rights of the parties.⁴ Where, therefore, the cause assigned for removal was legally sufficient, and there was sufficient evidence in support of it, to sustain the verdict of a jury, involving the conclusion that it had been maintained, the courts will not interfere with the decision; but if the cause assigned was legally insufficient, or the evidence was insufficient to sustain the verdict of a jury, the court will

¹ *Hughes v Felton*, 11 Colo. 489;
State v Tissot, 40 La. Ann. 598;
In re McNeill, 111 Pa. St. 235.
 See also, *Cooley Const. Lim.*, 5th ed.,
 159 (*133), and cases there cited.

² *Barker v People*, 3 Cow. (N. Y.) 686.

³ *People v Nichols*, 79 N. Y. 582, rev'g 18
 Hun 530.
 Accord, *People v Board of Police*, 39
 N. Y. 506;
People v Board of Police, 69 N. Y. 408;
People v Board of Police, 72 N. Y. 415;
People v Fire Com'rs, 72 N. Y. 445;

See also, *Asbell v Brunswick*, 80 Ga.
 503, and cases cited in the next two
 notes.

⁴ *People v Police Com'rs*, 93 N. Y. 97.
 See also, *People v Board of Police* 69 N.
 Y. 408, and other cases cited in the
 next note.

The removed officer cannot, on a certiorari, question the constitutionality of the statute creating the removing board. *State v Newark*, 49 N. J. L. 170.

set aside the decision, and restore the officer.' But the officer is entitled to such a review, only in the discretion of the supreme court, which may grant or refuse the certiorari at its discretion, and will refuse it in case of an unreasonable delay in applying for it; and the exercise of its discretion respecting the same cannot be reviewed by the court of appeals.²

XI. Removal by impeachment.

§ 399. **Constitutional provisions.**—This mode of removal from office is provided for and regulated by the constitution of the United States, and that of each of the states of the union. The former confers upon the house of representatives "the sole power of impeachment,"³ and upon the senate "the sole power to try all impeachments;" and provides that the senate, when sitting for that purpose, "shall be on oath or affirmation;" that the chief justice shall preside, when the president of the United States is tried; that no person shall be convicted, without the concurrence of two thirds of the members present; that judgment "shall not extend further than to removal from office, and disqualification to hold and enjoy any office of honor, trust or profit, under the United States;" but the party convicted shall, nevertheless, be liable and subject to indictment, trial, judgment, and punishment according to law;⁴ that a case of impeach-

¹ *People v Board of Police*, 39 N. Y. 506;
People v Board of Police, 69 N. Y. 408;
People v Fire Com'rs, 77 N. Y. 153;
People v Campbell, 82 N. Y. 247;
People v Fire Com'rs, 82 N. Y. 358,
 rev'g 9 W. D. (N. Y.) 390;
People v Jourdan, 90 N. Y. 53;
People v Police Com'rs, 93 N. Y. 97;
People v Thompson, 94 N. Y. 451, aff'g
 26 Hun (N. Y.) 28;
People v Fire Com'rs, 100 N. Y. 82;

People v Police Com'rs 10 Hun (N. Y.)
 106, aff'd 76 N. Y. 613;
People v Weygant, 14 Hun (N. Y.) 546;
People v French, 52 Hun (N. Y.) 90.
 See also, *State v Lamantia*, 33 La. Ann.
 446, and *post*, § 816.

² *People v Fire Com'rs*, 77 N. Y. 605.
People v Police Com'rs, 82 N. Y. 506.
 See also, *post*, § 808.

³ Const. U. S., Art. 1, § 2.

⁴ *Id.*, § 3.

ment is excepted from the general power of the president, to grant reprieves and pardons for offences against the United States;¹ and that “the president, and vice-president and all civil officers of the United States, shall be removed from office on impeachment for and conviction of treason, bribery, or other high crimes and misdemeanors.”² Provisions nearly identical in substance, except that the governor is substituted for the president, and the upper and lower houses of the legislature, are substituted for the corresponding houses of congress, and some convenient changes in details are made, are to be found in the constitution of every state in the Union. The principal variations relate to the constitution of the court for the trial of impeachments, which, in New York and several other states, consists, in addition to the senators, of the lieutenant governor and the judges of the court of appeals.³ But the lieutenant governor cannot sit in the court, where the governor is impeached. The constitution of New York further provides, that no judicial officer shall exercise his office, after articles of impeachment against him shall have been preferred to the senate, until he shall have been acquitted.⁴

§ 400. **Effect of such provisions upon other methods of removal.**—From the nature of the case, there are but few decisions of the courts, respecting proceedings for impeachment, and the effect thereof. These are confined to the statement of the rule, that the constitutional provisions for impeachment, do not affect other provisions of the constitution, for the removal of an officer by the governor, or other public authority, or the power of the legislature to provide for such removal; and that a removal in either mode is valid, although for a cause which would render

¹ Const. U. S., Art. 2, § 2.

² Const. N. Y., Art. 6, § 1.

³ Id., § 4.

⁴ Id.

the officer liable to impeachment, and to conviction thereupon.¹

XII. Suspension of a public officer.

§ 401. **English rule; suspended officer entitled to salary.**—The questions relating to the suspension of an officer are so intimately connected with those relating to his removal, that they will be considered here in conclusion of this chapter. In England, it is regarded as a prerogative of the crown by letters patent to suspend a public officer, although the office was granted for life.² And it was ruled by Lord Chancellor Nottingham, that where an officer is suspended by the crown, he is entitled to receive his salary, but not to exercise the functions of his office.³ In the king's bench it was said by Lord Holt, that suspension from a public office does not create a vacancy in the office; it is only an impediment to the officer enjoying any benefit from it; but all acts required to be done by such officer must still be done by him, in order to give them vitality.⁴

§ 402. **American rule; legislature may provide if constitution silent.**—No American case has been found by the author, which recognizes such a prerogative as existing, either in the president of the United States, or in the governor of a state. In truth, the subject of the suspension of public officers, is in most cases regulated by constitutional or statutory provisions. In the absence

¹ *Ante*, § 356; *McComas v Krug*, 81 Ind. 327;

Comm. v Harriman, 134 Mass. 314;

In re King, 25 N. Y. St. Rep'r 792; 6 N. Y. Supp. 420;

Barker v People, 3 Cow. (N. Y.) 686.

See, however, *Comm. v Williams*, 79 Ky. 42. In a case, published while this work was passing through the press, it has been held, that the

speaker of the house of representatives of a state, is not a state officer, and, therefore, is not liable to impeachment; and that he may be removed by the vote of the house. *In re Speakership*, 15 Colo. 520.

² *Slingsby's case*, 3 Swanst. 178.

³ *Slingsby's case*, 3 Swanst. 178.

⁴ *Philips v Bury*, 2 T. R. (D. & E.) 346, per Holt, Ch. J., p. 351.

of any express constitutional restriction on the power of the legislature, it may provide by statute for the suspension of a public officer, by some other officer or board. Such an exercise of legislative power is not deemed a violation of a constitutional provision, fixing the term of an officer;¹ and the distribution of legislative, executive, and judicial power by the constitution, forms no objection to conferring upon the judges of a court the power to suspend a sheriff.² But where the constitution creates an office and fixes its term, and designates the mode of removal of the incumbent, the legislature has no power to provide for his suspension for any other reason, or in any other mode.³

§ 403. **Whether power to remove includes power to suspend.**—There is a conflict of opinion, in some of the American cases, upon the question, whether, in the absence of an express constitutional or statutory provision on the subject, the power to remove an officer, vested in another officer, or in a board, implies that such officer or board possessess the power to suspend him, pending proceedings for his removal. It was held, in Missouri, that a power to remove from office necessarily includes a power to suspend from office; and where the charter of a city conferred upon the mayor and city council power to remove all city officers; and further provided that the mayor should have power to nominate, and with the consent of the board of aldermen, “to appoint all city officers, not ordered by this act to be otherwise appointed; also to suspend, and with the consent of the board of aldermen to remove, any city officer, except those elected by the people;” that the city council might, by ordinance, confer upon the mayor power to

¹ *Allen v State*, 32 Ark. 241.

² *State v Richmond*, 29 La. Ann. 705.

Lowe v Comm., 3 Met. (Ky.) 237;

State v Wiltz, 11 La. Ann. 439.

suspend a city officer elected by the people.¹ And, in New Hampshire, the supreme court held, that the suspension of an officer, by the authority vested with power to remove him, was valid without express statutory authority to suspend, saying: "It does not seem to require any argument to show that the power to remove must include the power to suspend."²

§ 404. **Weight of authority sustains negative.**—But the weight of authority in this country sustains the doctrine, that the power to suspend an officer does not follow from the grant of a power to remove him, or even from general words in a statute, which may refer to something besides removal. Thus, it has been held that a statute, providing that the mayor of a city "shall have a superintending control of all the officers and affairs of the city," and "shall cause all subordinate officers to be dealt with promptly for any neglect or violation of duty," does not confer upon him the power to suspend the city engineer.³ And the supreme court of New Jersey has ruled, that where the charter confers upon the common council of a city, power to expel one of its members for a specified cause, that does not confer the power to suspend him, by passing a resolution that he be not appointed upon any committee, and that he be not allowed to vote, debate, or take part in any of the proceedings before the council; because that would leave his constituents unrepresented, and without remedy. "Expulsion," said the court, "makes a vacancy that can be supplied by a new election. Suspension from the duties of the office creates no vacancy; the seat is filled, but the occupant is silenced. The charter vests no such power in the council; it would be extraordinary if it did. The power is to expel, not to

¹ *State v Lingo*, 26 Mo. 496.

See also, *State v Police Com'rs*, 16 Mo.

App. 48.

citing *Dillon Mun. Corp.*, 4th ed.,

§ 151, *note*.

³ *Metsker v Neally*, 41 Kan. 122.

² *Shannon v Portsmouth*, 54 N. H. 183,

suspend.”¹ The court of appeals of New York followed this ruling, and extended the doctrine to the suspension of an officer by a board authorized to remove him, in a very recent case, in which the court held that the commissioners of excise of the city of New York have not the power to suspend, although they have the power to remove, an inspector of excise. Peckham, J., delivering the opinion of the court, expressed his dissent from the rule laid down in Missouri and New Hampshire, and his concurrence with the ruling in New Jersey. He said: “There is nothing in the nature of the power to remove or expel, which necessarily and in all cases would include a power to suspend; for, in some instances, of which the above case is a good example, the power to suspend would seem to be very different in its nature from the power to remove, and not necessarily a minor power included in the power of expulsion. . . . Whether the power to remove includes the power to suspend, must, as it seems to us, depend, among other things, upon the question, whether the suspension, in the particular case, would be an exercise of a power of the same inherent nature as that of removal, and only a minor exercise of such power; or whether it would work such different results, that no inference of its existence should be indulged in, based only upon the grant of the specific power to remove. . . . The power to remove is the power to cause a vacancy in the position held by the person removed, which may be filled at once; and if the duties are such as to demand it, it should be thus filled. The power to suspend causes no vacancy, and gives no occasion for the exercise of the power to fill one. The result is, that there may be an office, an officer, and no vacancy, and yet none to discharge the duties of the office. . . . We do not go to the extent

¹ *State v Jersey City*, 25 N. J. L. 536.

of saying that, in no conceivable case, can the power to suspend be inferred from the grant of the power to remove. There may be cases, where such an inference, arising from the general scope and nature of the act granting the power, would be so strong as to compel recognition. We think there is no such inference to be drawn in the case before us.”¹

§ 405. **When mayor or common council may suspend.**—

Where a statute conferred upon the mayor of a city the power to suspend any officer of the city for ten days, for specified reasons; and directed him, immediately upon such a suspension, to convene the common council, which should have power to determine the charges, and, if they should be determined to be true, to remove the officer by a two thirds vote; and a statute was afterwards enacted, conferring upon the supreme court the power of removal of a particular officer of the city; it was held that the subsequent statute abrogated the mayor's power of suspension of that officer.² And where the mayor of a city is empowered by a statute to suspend an officer for cause, and temporarily to fill his place, subject to the action of the common council; the council may act upon any information attainable by it, and its disapproval brings to an end the powers of one temporarily so appointed by the mayor.³ Where the constitution of a state provides that an officer shall be suspended, in case he is impeached, until his acquittal; it is necessary, in order to effect a suspension for that reason, that articles of impeachment should be presented to and received by a senate, composed of a constitutional quorum.⁴

¹ *Gregory v Mayor, etc.*, 113 N. Y. 416, aff'g 11 N. Y. St. Rep'r 506.

See also, *Emmitt v Mayor, etc.*, 38 N. Y. St. Rep'r 907.

² *People v Crissey*, 91 N. Y. 616, at p. 637.

³ *State v Heinmiller*, 38 Ohio St. 101.

⁴ *In re Executive Communication* 12 Fla. 653.

§ 406. **Powers of locum tenens; suspended officer not entitled to salary.**—One appointed under the laws of Louisiana, in place of an assistant secretary of state, who has been suspended by the governor, is clothed only with ministerial duties, such as arise in the usual routine of his office; and he cannot either suspend or remove another officer, as the suspended officer might have done.¹ Where the charter of a city confers upon a board of officers the power to suspend any of the officers of the city, whenever the state of the funds or the public interest so requires, such a power is discretionary, and the exercise thereof cannot be reviewed by the courts.² Such a provision implies that the salaries of the suspended officers are not to be paid during the suspension; and indeed, the courts of this country have not followed the ruling of Lord Chancellor Nottingham,³ that a suspended officer is entitled to his salary, during the period of his suspension. The American authorities upon that subject are cited in a subsequent chapter.⁴

¹ *State v Herron*, 24 La. Ann. 432.

³ *Ante*, § 401.

² *People v Police Com'rs*, 20 Week. Dig. (N. Y.) 552.

⁴ *Post*, ch. 21, § 507

CHAPTER XVII

RESIGNATION; FORFEITURE

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I. Modes of resignation.

§ 407. **Resignation may be express or implied.**—The general rules, relating to the modes of resignation of an office, are briefly these. An office may be resigned, either expressly or by implication.¹ A resignation by implication, or, what is practically the same thing, a forfeiture

¹ Van Orsdall v Hazard, 3 Hill (N. Y.) 243, per Cowen, J., p. 247.

See also, Dillon Mun. Corp., 4th ed., § 224 (*163.)

of an office, occurs where the incumbent commits some act or omission, which clearly indicates an intent to abandon the office, or which disqualifies him from continuing to hold it. Each of these modes of resignation will be considered in its order.

II. *Express resignation.*

§ 408. **How and to whom resignation may be made.**—It has been said: “Where no particular mode of resignation is prescribed by law, and where the appointment is not by deed, it may be by parol; as by the incumbent declaring to the appointing power that he resigns his office, or will continue to serve no longer, and requesting an acceptance of his resignation. Nor need the acceptance be in writing. It is enough that the office be treated as vacant; for instance, by appointing a successor.”¹ A resignation in writing is good without a seal, although the statute requires the appointment to be under seal.² Where the statute is silent on the subject, a resignation must be made to the appointing power; or, if the office is elective, to the power authorized to call an election to fill the vacancy.³

§ 409. **Held, in England, that officer cannot resign without consent of appointing power.**—At common law, as we have shown in a previous chapter,⁴ a public office is regarded as a public burden, which it is the duty of

¹ *Van Orsdall v Hazard*, 3 Hill (N. Y.) 243, per Cowen, J., p. 248.

Accord, *Rex v Rippon*, 1 Ld. Ray. 563; 2 Salk. 433;

Reg. v Lane, 2 Ld. Ray. 1304; *Fortescue*, 275; 11 Mod. 270;

State v Ancker, 2 Rich (S. C.) 245;

Barbour v United States, 17 Ct. of Cl. (U. S.) 149.

See also, *Jennings's case*, 12 Mod. 402;

State v Allen, 21 Ind. 516;

People v Albany C. P., 19 Wend. (N. Y.) 27;

People v Metropolitan Board of Police, 26 N. Y. 316, rev'g 35 Barb. (N. Y.)

644; 14 Abb. Pr. (N. Y.) 151;

Edwards v United States, 103 U. S. 471.

² *Gilbert v Luce*, 11 Barb. (N. Y.) 91.

³ *Van Orsdall v Hazard*, 3 Hill (N. Y.) 243, per Cowen, J., p. 247.

See also, *Edwards v United States*, 103 U. S. 471.

⁴ *Ante*, ch. 10.

every good citizen to bear for the public benefit, and which, if he refuses to serve, he may be compelled to accept by mandamus, besides being subject to indictment, and, in the case of certain municipal offices, to a penalty. It necessarily results from this doctrine, that a person, who has once taken the burden of a public office upon himself, cannot lay it down at his own pleasure. Accordingly it has been held, that at common law, a public officer cannot resign his office without the consent of the appointing power, manifested, either by an express acceptance of the resignation, or by the appointment of another in his place.¹

§ 410. **American cases, holding that officer may resign at pleasure.**—The American cases upon this question, as upon many others relating to public offices, are in conflict. The doctrine, that a public officer may resign at pleasure, without the consent of the appointing power, was first laid down in broad terms by Mr. Justice Mac Lean, in a case arising in the United States circuit court. In an action upon the official bond of one Fogg, a collector of the United States internal revenue, the defence was that the breach occurred after the collector had presented his resignation to the president. Mr. Justice Mac Lean said: “There can be no doubt that a civil officer has a right to resign his office at pleasure, and it is not in the power of the executive to compel him to remain in office. It is only necessary that the resignation should be received, to take effect, and this does not depend upon the acceptance or rejection of the resignation by the president. And if Fogg had resigned absolutely and unconditionally, I should have no doubt that the defendant could not be held bound subsequently as his surety.” But inasmuch as the resignation was to take effect, by its

¹ *Rex v Lane*, 2 Ld. Ray. 1304;
Van Orsdall v Hazard, 3 Hill (N.Y.) 243;

Edwards v United States, 103 U. S. 471.

terms, when a successor should be appointed, and on successor was appointed for more than four months afterwards, the court intimated that, if the question had been properly presented by the bill of exceptions, the surety would have bound, as long as the collector continued in office.¹ Although these remarks were *obiter*, the doctrine thus laid down has been recognized and followed in other American cases, holding that an absolute and unqualified resignation by a public officer, in the absence of any statute to the contrary, vacates the office, from the time when the resignation reaches the proper authority, without any acceptance, express or implied, on the part of the latter;² or even, it was said in one case, if the appointing power expressly refuses to accept it.³ In another case it was held, that an unconditional resignation is complete, from the time when it is transmitted; so that if, before the officer empowered to fill the vacancy acts upon it, the resigning officer gives him notice that it is withdrawn, his subsequent appointment of another is valid.⁴

§ 411. **Other American cases, following the English rule.**—But in other American cases, the English rule has been recognized and followed. Thus, in the supreme court of New Jersey, a mandamus was granted to compel an overseer of highways to perform a duty of his office, although he had previously tendered his resignation to the township committee, and it had been accepted by them, but at a meeting which was not legally con-

¹ *United States v Wright*, 1 McL. (U. S.) 509.

² *People v Porter*, 6 Cala. 26;

State v Hauss, 43 Ind. 105;

Leech v State, 78 Ind. 570;

Gates v Delaware County, 12 Iowa 405;

State v Clarke, 3 Neva. 566;

Gilbert v Luce, 11 Barb. (N. Y.) 91;

Conner v Mayor, etc., 2 Sandf. (N. Y.) 355, per Sandford, J., p. 371; s. c., on appeal, 5 N. Y. 235, per Ruggles, Ch. J., p. 295;

Olmsted v Dennis, 77 N. Y. 378;

Bunting v Willis, 27 Gratt. (Va.) 144.

³ *State v Mayor, etc.*, 4 Nebr. 280.

⁴ *State v Fitts*, 49 Ala. 402.

vened, and in the absence of one of the members. The chief justice said: "If he" (the officer) "possesses the power to resign at pleasure, it would seem to follow, as an inevitable consequence, that he cannot be compelled to accept the office. But the books seem to furnish no warrant for this doctrine. To refuse an office in a public corporation, connected with local jurisdiction, was a common law offence, and punishable by indictment." Commenting upon the remarks of Mr. Justice Mac Lean, in *United States v. Wright*, the chief justice added: "It can hardly be supposed, that it was the intention of the judge to apply this remark to the class of officers, who are elected by the people, and whose services are absolutely necessary to carry on local government; or that it was the purpose to brush away, with a breath, the doctrine of the common law, deeply rooted in public policy, upon the subject. However true the proposition may be, as applied to the facts then before the circuit court, it is clearly inconsistent with all the previous decisions, if extended over the class of officers, where responsibility is the subject of consideration."¹ And in the supreme court of North Carolina it was said: "An officer may certainly resign, but, without acceptance, his resignation is nothing, and he remains in office. It is not true, that an office is held at the will of either party. It is held at the will of both. . . . Every man is obliged, upon a general principle, after entering upon his office, to discharge the duties of it, while he continues in office; and he cannot lay it down, until the public, or those to whom the authority is confided, are satisfied that the office is in a proper state to be left, and the officer discharged."²

¹ *State v. Ferguson*, 31 N. J. L. 107. This decision necessarily restricts the broad language as to the right of an officer to resign at will, used by the

court in *Hoboken v. Gear*, 27 N. J. L. 265.

² *Hoke v. Henderson*, 4 Dev. (N. C.) 1, per Ruffin, Ch. J., p. 29.

Other decisions of the American courts, cited in the note, affirm the same general rule.¹

§ 412. **The same subject; rulings of the U. S. supreme court.**—Indeed, the doctrine, promulgated by Mr. Justice Mac Lean in *United States v. Wright*, has been practically overruled by the United States supreme court, in a more recent decision. There the question was, whether a town supervisor in Michigan, whose resignation had been presented to the township board, but as far as it appeared in the proofs, had not been accepted by them, no successor having been appointed by the board, could be compelled by mandamus to execute a duty of the office. The court fully discussed the cases on both sides, and held, that inasmuch as no evidence had been presented, that the common law rule had been changed in Michigan by statute, but on the contrary the rule seemed to be confirmed by a statute, providing that an officer should hold over until his successor should be chosen and should qualify; the resignation was a nullity, and the mandamus was properly issued.² A similar ruling had been previously made by the same court, as to the effect of a statutory provision of Illinois, that an officer should hold over till the selection and qualification of his successor, which provision the court held, had the effect to retain the resigning officer in office, until such selection and qualification, although his resignation had been accepted by the proper authority.³

§ 413. **Officer who has not entered upon duties, or who is ineligible, cannot resign.**—One elected to an office can-

¹ *Waycross City Council, v. Youmans*,
85 Ga. 708;

State v. Clayton, 27 Kan. 442;

Rogers v. Slonaker, 32 Kan. 191;

State v. Boeker, 56 Mo. 17.

In *People v. Supervisor*, 100 Ill. 332,
and in *Jones v. Jefferson*, 66 Tex. 576,
the decision, in each case, turned

upon a constitutional or statutory
provision, requiring the acceptance
of a resignation, or that an officer
shall serve, until his successor is
appointed.

² *Edwards v. United States*, 103 U. S. 471.

³ *Badger v. United States*, 93 U. S. 599.

not resign it, until after he has qualified, and entered into possession of it.¹ A resignation implies that the person resigning has been elected to the office, which he resigns; a man cannot resign that to which he is not entitled, and which he has no right to occupy.² And one who is legally ineligible, but receives a majority of the votes for presidential elector, cannot, by declining the appointment, create a vacancy, which the governor can fill, under a general statute relating to filling vacancies, because he has not been lawfully chosen.³

§ 414. **English and American cases, as to withdrawal of resignation.**—It was held, by the English court of queen's bench, that under the municipal corporation act of 1882 (45 and 46 Vict., ch. 50, § 36), allowing a person elected to an office to resign it at any time, by a writing signed by him and delivered to the town clerk, and on payment of the fine provided for nonacceptance, the resignation is complete, when the writing is delivered to the town clerk, and the fine paid; and it cannot afterwards be withdrawn, even with the assent of the corporation.⁴ So, it has been held in several American cases, that an immediate and unqualified resignation, which has been received by the proper authority, creates an immediate vacancy, and cannot be withdrawn; and that the officer so resigning cannot resume the office, without a new appointment.⁵

§ 415. **Where prospective resignation may be withdrawn.**—But where the resignation is prospective, it may

¹ *Miller v Supervisors*, 25 Cal. 93.

B. D., 908; 54 L. J., Q. B., 338; 52 L. T., 435; 49 J. P., 372.

² *Reg. v Blizard*, 2 L. R., Q. B., 55; 36 L. J., Q. B., 18; 15 L. T. 242; 15 W. R. 105; 7 B. & S. 922, per Lord Cockburn, Ch. J. Approved, *In re Corliss*, 11 R. I. 638.

⁵ *State v Fitts*, 49 Ala. 402, cited *ante*, § 410;

Pace v People, 50 Ill. 432;

State v Hauss, 43 Ind. 105;

Gates v Delaware County, 12 Iowa 405;

Bunting v Willis, 27 Gratt. (Va.) 144.

³ *In re Corliss*, 11 R. I. 638.

⁴ *Reg. v Wigan Corporation*, 14 L. R., Q.

be withdrawn; at least with the consent of the appointing power, and, according to some cases, without such consent, unless some new rights have intervened, such as the appointment of a successor. In a case in the supreme court of Indiana, it was said: "To constitute a complete and operative resignation, there must be an intention to relinquish a portion of the term of the office, accompanied by the act of relinquishment. . . . A prospective resignation may, in point of law, amount but to a notice of intention to resign at a future day, or a proposition to so resign; and for the reason that it is not accompanied by a giving up of the office—possession is still retained, and may not necessarily be surrendered till the expiration of the legal term of the office, because the officer may recall his resignation—may withdraw his proposition to resign. He certainly can do this, at any time before it is accepted; and, after it is accepted, he may make the withdrawal, by the consent of the authority accepting, where no new rights have intervened." But where a successor has been appointed, a withdrawal, even with the consent of the appointing power, will not displace him.¹ In Missouri, where it has been held that a resignation is not complete, without the acceptance of the governor, it was also held, that the acceptance must be with the knowledge and consent of the person resigning; so that, where the clerk of a county court filed in the office of the court his resignation, to take effect at a future day, and, before the day specified, he forwarded to the court his written withdrawal of the resignation; but it had been previously, against his express directions, forwarded to the governor and approved, and another had been appointed in his place; it was held that the office had not

¹ *Biddle v Willard*, 10 Ind. 62, per Perkins, J., at p. 66;
Accord, *Bunting v Willis*, 27 Gratt. (Va.) 144;

State v Clayton, 27 Kan. 442; 41 Am. R. 418.

See also, *Leech v State*, 78 Ind. 570.

become vacant, and that the resigning officer might, with the sanction of the court, and at the same term, withdraw the resignation, and continue to hold the office, notwithstanding the governor's appointment.¹

§ 416. **Resignation of a lunatic.**—Where a commissioned officer in the United States army, while he was of unsound mind, tendered his resignation, and the same was accepted, and his successor was appointed, it was held that the resignation and the appointment of a successor were valid.²

II. *Resignation by implication; forfeiture.*

(1.) BY ACCEPTING AN INCOMPATIBLE OFFICE.

§ 417. **This subject considered in chapter IV.**—A person impliedly resigns, or forfeits, an office held by him, where he accepts an election or appointment to an incompatible office. This subject has been fully treated in a former chapter.³

(2.) BY NONUSER OF THE OFFICE, INCLUDING ABSENCE FROM THE PLACE, WHERE THE DUTIES OF THE OFFICE ARE TO BE PERFORMED.

§ 418. **English rule as to forfeiture by nonattendance, etc.**—It has been said that, at common law, an office may be lost by forfeiture; as if the officer “break the condition annexed to it by law;” as if an officer of a court refuses or neglects to attend the court; but not where he had lawful license, or was imprisoned for misdemeanor in office.⁴ And where an office concerns the administration of justice, if the officer ought to act or attend, without

¹ *State v Boecker*, 56 Mo. 17.

² *Blake v United States*, 14 Ct. of Cl. (U. S.) 462. As to the application of the same rule to a civil officer, see the opinion of the court, p. 476. That the removal of a lunatic, upon

charges and after a trial, is valid, see *ante*, § 357.

³ *Ante*, ch. 4.

⁴ *Com. Dig.*, tit. Officer, K. 2.

See also, *Bac. Abr.*, tit. Offices and Officers, M.

request, nonuser or nonattendance will work a forfeiture; but if he is not required to exercise his office except upon request, the nonuser is no ground of forfeiture, unless there has been a request and a subsequent neglect.¹ But a desertion and neglect of the duties of an office are well recognized, at common law, as affording sufficient cause for a removal of the delinquent officer.²

§ 419. **American adjudications on this question.**—In an action to recover the salary, attached to the office of chief of police of a city, for a period of time, subsequent to the passage of a resolution by the council, discharging the plaintiff from that office; where it was shown that the plaintiff had said that he was going to Kansas, and did in fact go west, and was absent a considerable time; that he had made no reports for some time previously; that he was engaged in various other business matters, and did very little actual service as chief of police; it was held that the jury might infer from these facts that he had been removed from, or had abandoned or relinquished the office, so as to vacate it: and so a rule to show cause, why a verdict for the defendant should not be set aside, was discharged, and judgment was entered on the verdict.³ So, in an action to oust the defendant from the office of tax collector, and to reinstate the relator, who was reëlected, but surrendered the office to the defendant, his competitor, under the erroneous belief that the latter had been elected, and made no attempt to perform the duties during the following two years; the court said: “Public office is held, upon the implied condition of diligently and faithfully executing the duties belonging to it, and a wilful refusal to perform the duties

¹ Earl of Shrewsbury's Case, 5 Coke, Part IX, p. 46.

² Buller N. P. 206, 207;

Rex v Richardson, 1 Burr. 517;

Rex v Wells, 4 Burr. 1999;

Lord Hawley's case, 1 Vent. 143;

Reg. v Ipswich Bailiffs, 2 Ld. Ray. 1232; 2 Salk. 494.

³ Bernard v Hoboken, 27 N. J. L. 412.

works a forfeiture. By the surrender and nonuser of the office for a period of more than two years, relator therefore forfeited his right to it." And so a judgment, ousting the defendant, but refusing to reinstate the relator, was affirmed.¹ But where the plaintiff was elected in 1871, to fill an office for the term of four years; and in 1873 an act was passed for an election in November of that year, to fill the office; and the plaintiff and the defendant, being candidates for the nomination, entered into an agreement to abide the result of the nominating meeting; and the defendant was nominated at that meeting, and elected in November; and the plaintiff surrendered the office to him; but it was afterwards adjudged, that the statute was unconstitutional; whereupon the plaintiff brought this action to recover the office; it was held, that the plaintiff was not estopped by his agreement, and that such agreement, and the surrender of the office, did not amount to an abandonment of the office.² It has been held, that where a judge engages in a rebellion against the government, under which he holds his office, he thereby vacates his office, and a judicial determination is not necessary to complete the forfeiture thereof.³

§ 420. **The same subject.**—In order that an officer's conduct, which takes the shape of nonuser, should amount to an actual vacation, although without express renunciation of his office; the nonuser must be total and complete, and of such continuance as to indicate clearly a total relinquishment. And where an officer of the United States, after being informed that the president intends to vacate the office, is suspended under U. S. R. S., § 1768, and does not, upon the adjournment of the senate, seek to recover the office, nor tender his service,

¹ *People v Hartwell*, 67 Cal. 11.

³ *Chisholm v Coleman*, 43 Ala. 204.

² *Turnipseed v Hudson*, 50 Miss. 429.

nor demand the salary; his conduct evinces an intention to abandon the office, and is equivalent to a resignation.¹ So the voluntary enlistment of a civil officer, in the military service of the United States, for three years or during the war, has been regarded as an abandonment or implied resignation of his office, so as to create a vacancy in the same.²

§ 421. **How forfeiture may be declared against one acting in office.**—But where a person, under color of authority, is actually in possession and discharging the duties of an office, the question, whether he has or has not forfeited it by some act or omission, cannot be examined collaterally.³ And where an officer is charged with having vacated his office by absence and neglect, the appointing power cannot, without a judicial determination that there is a vacancy, proceed to fill the office, as if it was vacant.⁴ “After once accepting an office, refusal to serve is a cause of forfeiture, if without good reason; but however general and absolute, it is not a forfeiture *per se*.”⁵ Thus, if a county judge or other county officer, without intending a permanent change of residence, so absents himself from his county, as to be guilty of wilful neglect in the discharge of his official duties, he may be liable to prosecution in the manner provided by law; but the mere existence of such neglect will not of itself operate to vacate the office.⁶ Where no authority is expressly empowered by law to enforce the forfeiture of an office, upon the occurrence of an act which creates

¹ *Barbour v United States*, 17 Ct. of Cl. (U. S.) 149.

L. (N. C.) 216.

² *State v Allen*, 21 Ind. 516.

See, however, *Bryan v Cattell*, 15 Iowa 538.

⁴ *State v Bryce*, 7 Ohio, Part II. 82.

See also, *People v Kingston, etc.*, Turnpike Co., 23 Wend. (N. Y.) 193, per Nelson, Ch. J., pp. 207, 208.

³ *McKim v Somers*, 1 Penn'a Rep. 297.

See also, *Hunter v Routledge*, 6 Jones

⁵ *Van Orsdall v Hazard*, 3 Hill (N. Y.) 243, per Cowen, J., p. 246.

⁶ *Curry v Stewart*, 8 Bush (Ky.) 560.

a forfeiture, the office does not become vacant, until judgment upon quo warranto, or other appropriate legal proceeding.¹

§ 422. **Abandonment or nonuser must be total; instances.**—In a well considered case, in the court of common pleas in New York city, it was held that the deputy clerk of the court of sessions, elected a member of the legislature, does not, by attending at Albany to perform his duties as such member, and consequently absenting himself from the city of New York, where his duties are to be performed, either forfeit his office, or forfeit his salary during the period of his absence. Such absence, as in case of other neglects of official duties, may afford grounds for removal by the proper authority, but does not constitute an absolute forfeiture of the office.² So, where the secretary of state, in violation of an express statute, persistently absented himself from the seat of government, leaving the performance of his duties to a deputy; it was held, that he had not vacated his office thereby; that a declaration and adjudication by the governor, that he was out of office, by abandonment of it, was void; and that an abandonment of an office, if it can be inferred conclusively from nonuser or neglect of duty, must be “where the nonuser or neglect is not only total or complete, but of such continuance, or under circumstances so clearly indicating absolute relinquishment, as to preclude all future question of the facts.”³ And where a statute empowers the county court to supply any vacancy in a county office, the absence, on account of sickness, of a county officer from his office, for the space of fifty days, does not create a vacancy, or authorize the county court to appoint a successor.⁴ But nonuser may be so greatly pro-

¹ *Graham v Cowgill*, 13 Kan. 114.

³ *Page v Hardin*, 8 B. Mon. (Ky.) 648.

² *People v Green*, 5 Daly (N. Y.) 254.

See, per Marshall, Ch. J., p. 667.

Reversed, but this general principle affirmed, 58 N. Y. 295.

⁴ *State v Baird*, 47 Mo. 301.

longed, especially where it is accompanied with other acts, as to indicate conclusively an abandonment of the office; and in that case no removal or judicial declaration is necessary. Thus, where a police officer, who was unlawfully removed, delivered up his badge, and other public property held by him, and ten years thereafter sued to recover his salary; it was held that he could not recover, as he must be deemed to have abandoned his office.¹

§ 423. **Rule where lieutenant-governor is authorized to act in absence of governor.**—While the subject of temporary absence, from the place of performance of official duties, is under consideration, it will be convenient to notice briefly the effect of such temporary absence, upon the power of another officer to discharge the duties of the absent officer, where there is no pretence that the absence has forfeited the latter's office. It was held in Louisiana, that the constitutional provision, that the lieutenant-governor shall discharge the duties of the governor, in case of the absence or inability of the latter, refers only to such absence or inability as will injuriously affect the public interest; and that consequently the lieutenant-governor has ordinarily no power to act as governor, where the duration of the governor's absence from the state does not exceed a few days. Where a case occurs, in which the lieutenant governor is thus authorized to act, it is to be ascertained by some proof, accessible to the public, from which the public may with certainty know that he is so authorized; and no provision being made by law for the mode of manifestation thereof, it is left to the governor to manifest the same, in such manner as he, in his discretion, thinks proper.²

¹ Phillips v Boston, 150 Mass. 491.

² State v Graham, 26 La. Ann. 568.

(3.) BY CEASING TO BE A RESIDENT OF THE DISTRICT, TO WHICH THE OFFICE PERTAINS; OR, IN THE CASE OF A STATE OFFICE, OF THE STATE.

§ 424. **Generally statute, etc., provides for such forfeiture.**—The doctrine of the “political common law,” so called, requiring residence as a qualification for holding an office, has been considered in a former chapter.¹ In this country, the constitution or the statutes of the United States, and of each of the states, contain special provisions, requiring certain officers to be residents of their districts, or of the state, as the case may be; and declaring that such an officer forfeits his office, by a removal from the district or the state.²

§ 425. **No adjudication necessary; but temporary absence creates no forfeiture.**—Under such a provision, it has been held, that the office becomes vacant, when the incumbent ceases to be a resident of the district; and that his successor may be appointed, without an adjudication that the office is vacant.³ So, under the statute of Massachusetts, whereby a person gains a settlement in a town, by being a public officer therein for “one whole year;” it was held that an occasional absence, or a failure through sickness to discharge a particular act, does not interrupt the running of the year; but it is interrupted by a compulsory removal from the district, or a voluntary removal to another town, with the intention to reside in the latter.⁴ That a temporary removal, without an intention to make a permanent change of residence, does not affect the tenure of the office, has also been held in

¹ *Ante*, § 72.

² *Giles v School Dist.*, 31 N. H. 304;
Gildersleeve v Board of Education, 17
Abb. Pr. (N. Y.) 201.

See also, *Rumney v Campton*, 10 N. H.
567

³ *People v Brite*, 55 Cal. 79.

See also, *Yonkey v State*, 27 Ind. 236;
Curry v Stewart, 8 Bush (Ky.) 580;
In re Bagley, 21 How. Pr. (N. Y.) 151.

⁴ *Paris v Hiram*, 12 Mass. 282;
Barré v Greenwich, 1 Pick. (Mass.) 129.

other cases.¹ If an office has been once thus abandoned, the effect of the abandonment is not removed by the officer's return, and reoccupation of the office.²

§ 426. **Changing boundaries or districts, so as to affect officer's residence, etc.**—But the removal of a county officer, out of the district for which he was elected, to another district in the same county, does not vacate his office.³ And the redistricting of a county, so as to leave the officer in another district, does not vacate his office.⁴ But if the change of the boundaries of a county, places the residence of an associate judge without the county, and he does not remove within the county, in a reasonable time, he forfeits his office.⁵ Where a circuit judge's commission designated his circuit as the fifteenth circuit, without specifying its boundaries, and a statute was enacted, placing in the 26th circuit the counties then in the 15th, and a new judge was appointed for the new 15th circuit; it was held that the former became judge of the 26th circuit, without any new commission; and *semble*, that, under the provision of the constitution, fixing his term, the legislature could not abolish his office, by abolishing his circuit.⁶

(4.) BY REFUSAL TO ACCEPT THE OFFICE.

§ 427. **Rule where legislature transferred a person from one office to another.**—Although, as was shown in a former section of this chapter,⁷ an officer cannot resign his office, unless he has entered into possession thereof,

¹ *People v Wells*, 2 Cal. 198, 610;
Yonkey v State, 27 Ind. 236;
Curry v Stewart, 8 Bush (Ky.) 560;
McGregor v Allen, 33 La. Ann. 870.
 See also, *Lyon v Comm.*, 3 Bibb (Ky.)
 430;
People v Goodwin, 22 Mich. 496;
State v Skirving, 19 Nebr. 497;
Van Orsdall v Hazard, 3 Hill (N. Y.)
 243, per Cowen, J., p. 245.

² *State v Allen*, 21 Ind. 516, at p. 523;
Yonkey v State, 27 Ind. 236.

³ *Smith v State*, 24 Ind. 101.

⁴ *State v Gilbreath*, 48 Mo. 107;
State v Milwaukee Co., 21 Wis. 443.

⁵ *State v Choate*, 11 Ohio 511.

⁶ *State v Draper*, 50 Mo. 353.

⁷ *Ante*, § 413.

yet in many cases the refusal to accept an office, to which a person has been chosen, will create a forfeiture, or furnish sufficient ground for a forfeiture, as the case may be. Thus, where the legislature of New York enacted a statute, creating a metropolitan board of police, for the counties of New York, Kings, Westchester, and Richmond, to take the place of the different police authorities in each county, and providing that "the police in the cities of New York and Brooklyn, officers and patrolmen," should, after a certain time therein designated, "hold office and do duty" under the provisions of the new statute, by which provision, as the court decided, a new office of "patrolman and member of the police force of the metropolitan police district" was created; and the relator, who was a member of the police force of the city of New York, took no steps for two years to submit himself to the authority of the board, "disclaimed taking" the office, "and repelled its duties, and followed his own pursuits, having no connection with the police service;" it was held, that he could not maintain a mandamus to restore him to the position of member of the new police force. The court said: "The legislature did not attempt to compel him to continue in office, but only gave him the liberty of continuing; and if he consented, and complied with the act, he thereby became a part of the new force. No penalty or punishment was imposed, for not accepting or not continuing; and he could, on the day his functions under the former act ceased, have refused or rejected the office, or withdrawn from or resigned the position cast upon him by legislative authority. That he did do this, is found as a fact. To divest him of the office thrust upon him, a formal resignation was not necessary. Affirmative acts, on his part, of resignation or repudiation of the office, are quite as effectual to divest him of it, as affirmative words spoken or written. . . . There was a complete practical

desertion, abandonment, and repudiation of the office and its duties.”¹

§ 428. **Express refusal to qualify; case where new bond was required.**—It has been held, that a person, elected county judge for a full term, may signify his refusal to qualify, before the expiration of the time fixed by law for qualifying; and thereupon his office becomes vacant, and an appointment may be made immediately, although by statute the incumbent holds over until his successor qualifies.² But a presumption, that the officer elect abandons the office, does not arise merely from his omission to qualify within the prescribed time.³ Where, pursuant to a statute, requiring the sheriff to give a new bond, whenever the governor, upon the application of his sureties, should direct him so to do, and providing that the right to exercise the powers of the office should be forfeited, in case of his failure so to do; the governor directed a sheriff to give a new bond to the ordinary of the county, and the sheriff failed to comply with the direction; it was held that the forfeiture had occurred, although meanwhile a vacancy had happened in the office of ordinary, since a statute provided that in such a case, the clerk of the superior court should act as ordinary.⁴

(5) MISCELLANEOUS CONSTITUTIONAL OR STATUTORY CAUSES
OF FORFEITURE.

§ 429. **Failure to keep office open; forfeiture not prevented where act is a misdemeanor.**—Where a statute requires an officer to keep his office open for the transaction of official business, during certain hours of a

¹ *People v Metropolitan Board of Police*, 26 N. Y. 316, explaining *People v Metropolitan Board of Police*, 19 N. Y. 188.

² *State v Washburn*, 17 Wis. 658.
See also, *People v Wilson*, 72 N. C. 155.

³ *State v Peck*, 30 La. Ann. Part I., 280.
See *ante*, ch. 11, where this subject is fully considered.

⁴ *Bosworth v Walters*, 46 Ga. 635.
See also, ch. 11, *ante*.

particular day, and provides that his failure so to do, unless caused by sickness, "shall forfeit his office;" a forfeiture on that ground can be enforced only by proceedings in the nature of a quo warranto, and cannot be made part of the judgment, on conviction of a misdemeanor for neglecting the duties of his office.¹ Where a statute provided, that no councilman of any municipality should become surety for the treasurer, secretary, or other officer of the municipality, and that, for a violation of this provision, he should forfeit his office, and be guilty of a misdemeanor, and on conviction should be fined, etc.; and another statute provided that the councils of Philadelphia should judge and determine the qualifications of their members; it was held, that where a member of the council became a surety for the city treasurer, this forfeited his office as councilman; that such forfeiture arose from the unlawful act, and not only upon conviction of misdemeanor; that the power of the council to impeach, try, and remove a member for the offence, was not incompatible with the judicial power to oust a usurping officer; and that their neglect to take such proceedings was not a bar to legal proceedings to declare a forfeiture.²

§ 430. **Forfeiture for felony not avoided by pardon.**—An officer, whose office has been forfeited, under a constitutional or statutory provision, by a conviction for a felony, is not restored to his office by a pardon.³

¹ *State v Norman*, 82 N. C. 687.

² *Comm. v Allen*, 70 Pa. St. 465.

³ *State v Carson*, 27 Ark. 469.

See also, *Comm. v Fugate*, 2 Leigh (Va.) 724;

CHAPTER XVIII

GENERAL RULES RESPECTING VACANCIES, AND DECLARING
AND FILLING THE SAME

CONTENTS

- SEC. 431. Reference to other chapters; meaning of “vacant” and “vacancy;” applicable only where officer has been chosen, not to failure to elect, or where a person is in the office and acting, although temporarily, as by holding over; cases where provisions for filling vacancies not applicable for that reason.
432. Vacancy occurs, where officer elect dies before votes counted; or declines to accept.
433. Statute for filling vacancies by appointment, when not in conflict with constitutional provision, requiring officer to be elected.
434. Provision creating vacancy for failure to qualify, within a certain time after receipt of commission, applies only to an actual receipt.
435. Election to fill anticipated vacancy not lawful, unless expressly provided for; otherwise as to appointment.
436. Power to appoint includes power to fill vacancy; power to appoint “forthwith” not confined to same day.
437. Power to fill a vacancy does not confer power to make or declare a vacancy; illustrations and limitations of this rule.
438. Resolution that office is vacant not a removal; but appointing power may act upon assumption of a vacancy, leaving appointee to test the question.
439. Contested election, or judgment for relator on quo warranto, does not create vacancy.
440. When governor cannot appoint, after adjournment of the senate, to fill a vacancy occurring during the session.

§ 431. **Meaning of “vacant” and “vacancy” and application thereof.**—The cases where vacancies do or do not occur in public offices; the effect of a vacancy; the mode

of filling it; the tenure of office of a person appointed to fill a vacancy; and his rights and duties; have been very fully discussed in the chapters, treating of a plurality of offices held by one person; the persons who may or may not hold public offices; the appointment or election of a person to office; his acceptance or refusal; his official oath and bond; his term of office; the cases where an officer does or does not hold over after his term; the removal or suspension of an officer; and the resignation or forfeiture of an office.¹ Only some general propositions, and some illustrations, which could not conveniently find their places elsewhere, remain, to complete the consideration of this subject.

“There is no technical or peculiar meaning to the word ‘vacant,’ as used in the constitution. It means empty, unoccupied, as applied to an office without an incumbent. There is no basis for the distinction urged, that it applies only to offices vacated by death, resignation, or otherwise. An existing office without an incumbent is vacant, whether it be a new or an old office.”² “The word ‘vacancies’ is applicable to cases, where officers have been duly chosen or appointed, and not to the cases where there has been an omission to elect. . . . In such cases, there is, in fact, no vacancy, because the officers of the preceding year hold the offices, until others are chosen or appointed in their places, and have qualified. An office cannot be said to be vacant, while any person is authorized to act in it, and does so act.”³ A constitu-

¹ *Ante*, ch. 4, 7, 8, 9, 10, 11, 14, 15, 16, 17.

² *Stocking v State*, 7 Ind. 326, at p. 329; followed, *Collins v State*, 8 Ind. 344; *State v Harrison*, 113 Ind. 434; *State v Howe*, 25 Ohio St. 588.

³ *People v Van Horne*, 18 Wend. (N. Y.) 515, per *Savage*, Ch. J., at p. 518, speaking of a case where a town officer was

not elected, because there was a tie in the votes. Approved and followed, *Tappan v Gray*, 9 Paige (N. Y.) 507, per *Walworth*, Ch’r, p. 512; *People v Woodruff*, 32 N. Y. 355, per *Davies*, J., p. 362.

See also, *State v Lusk*, 18 Mo. 333; *Comm. v Hanley*, 9 Pa. St. 513.

tional provision, authorizing the governor to fill vacancies, applies only where there is no person authorized by law to discharge the duties of the office. Where there is a person so authorized to act temporarily, until the action of the electing or the appointing power, the governor has no power to appoint; and it makes no difference whether the power authorizing him to appoint is conferred by the constitution or by a statute. Where a statute provides, that an officer shall be elected by the legislature, and shall hold until his successor is chosen and qualifies, the failure of the legislature to elect his successor does not authorize the governor to fill the office by appointment.¹ And where a board has the power to fill a vacancy in its membership, until the next session of the legislature, at which time the legislature is required to fill it for the unexpired term; and the next session of the legislature has adjourned *sine die*, without filling the vacancy; the governor has no power to fill it, either for a full term, or for the unexpired portion of the term.²

§ 432. **Where officer dies before votes are counted; or declines.**—Where a person dies, after he has been chosen a county officer, but before the votes are counted, the supreme court, under the statute of New Hampshire, has power to declare the office vacant.³ And where a person is elected a judge of the superior court, and declines to accept the office, and never qualifies, this creates a vacancy, within the constitutional provision authorizing the governor to fill vacancies; and a statute, providing for an election to fill such vacancy, is unconstitutional.⁴

¹ *People v Tilton*, 37 Cal. 614.

² *People v Parker*, 37 Cal. 639.
See also, *People v Bissell*, 49 Cal. 407;
and cases cited, *ante*, ch. 15.

³ *State v Hunt*, 54 N. H. 431.

⁴ *People v Wilson*, 72 N. C. 155.
See also, *State v Washburn*, 17 Wis.
658, cited *ante*, § 428.

§ 433. **Statute as to appointment to fill vacancy, not in conflict with constitution requiring election.**—A statute, allowing a particular officer or board to fill a vacancy in an office, until the next election, is not in conflict with a constitutional provision that, such office shall be filled by a popular election.¹

§ 434. **What is a "receipt of commission."**—Where it was provided by statute, that if an officer should fail to give his official bond, within ten days after the receipt of his commission or certificate of election, the office should be vacant; and the incumbent was reelected to an office in October, 1866, and his commission was, in November, 1866, made out and left for him at the office of the secretary of state; but he did not call for it and receive it until the 6th of April, 1867; and on the 12th of April, 1867, the governor declared that a vacancy existed in the office, and issued a commission to another person, who entered upon the discharge of the duties of the office on the 15th of the same month; it was held that the ten days did not begin to run until the actual receipt of the commission, or the occurrence of circumstances, leading to the inference that he did not intend to accept it; and that his failure to call for the commission was not evidence of such an intent.²

§ 435. **Anticipated vacancy, election to fill, and appointment.**—In the absence of any statutory provision, allowing an election to fill a vacancy to be held before the vacancy actually exists, an election to fill an anticipated vacancy is not valid.³ It has been held, however, that a

¹ *Hedley v Com'rs*, 4 Blackf. (Ind.) 116.
Accord, *State v Benedict*, 15 Minn. 198;
Tappan v Gray, 9 Paige (N. Y.) 507.

² *State v Hadley*, 27 Ind. 496.
 See also, *State v Porter*, 7 Ind. 204;
Ross v Williamson, 44 Ga. 501.

³ *Dillon Mun. Corp.*, 4th ed., § 222 (161);

Paine on Elections, § 214.

See also, *Nooe v Bradley*, 3 Blackf. (Ind.) 158;

Biddle v Willard, 10 Ind. 62;
People v Witherell, 14 Mich. 48;
State v McGrath, 64 Mo. 139;
Comm. v Baxter, 35 Pa. St. 263;
Lindsey v Luckett, 20 Tex. 516.

prospective appointment may lawfully be made, to take effect when an impending vacancy may occur.¹

§ 436. **Power to appoint includes power to fill vacancy; power to appoint "forthwith."**—A power to elect or appoint to an office, includes a power to fill a vacancy therein.² A power to fill a vacancy, caused by death or disability, includes a power to fill a vacancy caused by resignation.³ A statutory provision, that if a town treasurer refuses to serve, or if his office becomes vacant, the town supervisors shall "forthwith appoint a treasurer," does not require the supervisors to act on the very day, when the office is vacated by the treasurer's failure to qualify.⁴

§ 437. **Power to fill does not confer power to declare a vacancy.**—A statute, conferring upon a board power to fill a vacancy, does not empower them to create a vacancy; but they may decide, in the first instance, whether a vacancy has occurred.⁵ A constitutional provision, giving the governor power to fill vacancies during the recess of the senate, gives him no power to make a vacancy by a declaration that one exists, and by granting a commission to fill such supposed vacancy; and his decision that the vacancy exists will not conclusively affect the right of others.⁶ The appointment by the governor of a person to fill an office, rightfully held by an incumbent, whose term of office has not expired, and who cannot be arbitrarily removed, is void; and the surrender of the office by the incumbent, to the person so appointed, does not validate the appointment, but creates a vacancy. The constitution empowers the governor to

¹ *State v Van Buskirk*, 40 N. J. L. 463, criticising the cases cited in the last preceding note.

See also, *Attorney-General v Love*, 39 N. J. L. 476, and *ante*, §§ 91, 92.

² *People v Campbell*, 2 Cal. 135.

³ *State v Newark*, 27 N. J. L. 185.

⁴ *Supervisors v Kaime*, 39 Wis. 468.

⁵ *Hedley v Com'rs*, 4 Blackf. (Ind.) 116.

⁶ *Page v Hardin*, 8 B. Mon. (Ky.) 648; see p. 669.

Accord, *Honey v Graham*, 39 Tex. 1.

fill such a vacancy; but the previous appointment does not, in legal effect, fill the vacancy. Where the general assembly assumed to exercise the power of filling the vacancy, and chose a person for that purpose; and, upon a certificate of such choice, the governor issued to the person so chosen a commission, reciting that he was commissioned as the elect of the general assembly, it was held that this was not an appointment by the governor to fill the vacancy, as provided by the constitution, and that the person named in the commission was not entitled to the office.¹ Where a statute provided that the board of trustees of the Ohio university might "suspend" a member of the board for cause, and if "any such removal" should occur during the recess of the legislature, might fill the vacancy, by an appointment to endure until the end of the next session of the legislature; and that, "where a vacancy occurs by death, resignation, or otherwise, it shall be supplied by the legislature at its next session;" it was held, that if the relator had forfeited his office as one of such trustees, by absence and neglect of his duties, it was necessary that the board, after reasonable notice to him, and an opportunity to be heard, should investigate the facts, and determine his office by sentence, and thus create a vacancy; and that a legislative appointment of another in his place, without a vacancy thus created, or created by his own resignation, conferred no legal right upon the person so appointed.²

§ 438. **Effect of a resolution that office is vacant.**—It has been held, that a county treasurer may be removed, for failure to account for money received by him, although it was stolen; but a resolution by the county commissioners that the office is vacant is not a removal; there must be a notice, a hearing, and a decision that he be

¹ State v Peelle, 124 Ind. 515.

² State v Bryce, 7 Ohio, Part II, 82.

ousted.¹ Where, however, it appears presumptively that acts or omissions have occurred, subjecting a person to a judicial declaration that he vacated his office, the authority empowered to fill a vacancy in the office may proceed, "before procuring a judicial declaration of the vacancy," to appoint or elect a person to fill the office. But if, in attempting to take possession of the office, the person so appointed is resisted by the former incumbent, he must test his right to oust the latter by legal proceedings.²

§ 439. **Effect of contested election, or judgment on quo warranto.**—A contested election does not authorize the governor to fill the office by appointment, as in case of a vacancy.³ Nor does the power to fill a vacancy authorize an appointment, where, upon a quo warranto, a judgment is obtained against the incumbent, on the ground that the relator has the better title; in order to set the power in motion, there must be such a vacancy that no one has title to the office.⁴

§ 440. **Where governor cannot appoint after adjournment of senate.**—Where the senate is in session, and the term of a chancellor will expire before the next session, it is the duty of the governor to nominate a person to the senate to fill the vacancy; if he fails so to do, he cannot, during the recess of the senate, make a valid appointment to fill the vacancy. But, although the appointment will be void, a person so appointed will become a chancellor *de facto*, and his judicial acts as such will be valid. So he may appoint a clerk of the court.⁵

¹ State v Sheldon, 10 Nebr. 452.

See further on the subject of filling vacancies, *ante*, §§ 99-103.

² State v Jones, 19 Ind. 356.

See also, Canniff v Mayor, etc., 4 E. D. Smith, (N. Y.) 430.

⁴ State v Ralls County Court, 45 Mo. 58.

⁵ Brady v Howe, 50 Miss. 607.

⁸ Gold v Fite, 2 Baxt. (Tenn.) 237.

BOOK IV

COMPENSATION

CHAPTER XIX

GENERAL PRINCIPLES; FIXING, INCREASING, AND
DIMINISHING COMPENSATION

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447. Rule applies, whether it is claimed as salary, fees, or otherwise.

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452. Cases where officer, allowed fees by statute, is required by the appointing power to agree to accept a gross sum in lieu thereof.

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458. Power given to change compensation, does not authorize its abolition, or reduction to a nominal sum.

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461. Whether an insufficient appropriation is or is not a reduction of a fixed salary; appropriation to pay one, who holds three offices, not available to his successor in two.

462. Rules, where statute provides that one officer's compensation shall be the same as another's; foreign minister entitled to his salary, in equivalent of U. S. money.

463. Requirement that salary be fixed before appointment, does not call for a new fixing, whenever officer changed.

Chap. XIX.] COMPENSATION GENERALLY

SEC. 464. Resolution that salary be "fixed" at a certain sum, is sufficient reduction of a larger salary; reduction may be made by implication; if board authorized to fix, subject to approbation of another board, latter board cannot change, but only approve or disapprove; if fees to be fixed by order, no fees allowed till order made; statute, fixing a monthly rate, entitles officer to monthly payments.

V. *Construction and effect of constitutional and statutory provisions, forbidding an increase or diminution of compensation.*

- 465. They are usually confined to the term held at the time; cannot be evaded by a resignation and reappointment; they apply if term has begun, though but for an hour, and to appointment to fill vacancy, though increase made before the vacancy; officer's right not affected by his receiving compensation, as unlawfully reduced.
- 466. Constitutional prohibition, relating to salaries, does not prevent statute to pay officers in U. S. legal tender notes; nor does it apply, where the compensation is a percentage, a commission, or fees.
- 467. It applies only to compensation definitely fixed; illustrations; it does not invalidate an ordinance passed before, but taking effect after, commencement of term.
- 468. It does not apply, where additional distinct duties are imposed; but it applies, where duties belonging to office are thus compensated.
- 469. It forbids deduction of compensation for absence; but not where officer's consent required.
- 470. Constitutional prohibition of such a "law" not applicable to a city ordinance, or proceedings of county officers; applies to officer holding during good behavior.
- 471. It applies where a chartered city is reorganized under a general law.

VI. *Times of the beginning and the ending of an officer's compensation.*

- 472. Officer not entitled until he qualifies; but then he may have compensation from beginning.
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- 474. Compensation ends when term ends; no right to a full quarter's salary.

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476. Exception, where officer who had done a year's work, was allowed a year's salary, although his office was abolished before the end of the year.

I. Definitions and general rules.

§ 441. "Salary" and "emoluments" defined.—"The term 'salary' of itself imports a compensation for personal services, and not the repayment of moneys expended in the discharge of the duties of the office."¹ But where a state constitution forbade the increase or diminution of the "emoluments" of an office, during the term of the incumbent, it was held, that the sum provided by law for the compensation of a sheriff, for the board of prisoners in his charge, was an "emolument" of his office, and so within the constitutional provision.²

§ 442. "Compensation" may include a sum allowed to cover expenses.—In a recent decision of the court of appeals of New York, the effect of the word "compensation," as used in the constitution of that state, was determined. The constitution, as amended in the year 1880, fixes the term of office of a justice of the supreme court at fourteen years, but provides that he cannot hold office after the 31st day of December, following his attaining the age of seventy years. Then follows a provision, that "the compensation" of a justice of the supreme court, whose term of office is thus abridged, and who shall have served ten years or more, "shall be continued during the remainder of the term, for which he was elected." In 1870, a statute was enacted, providing that "the justices of the supreme court shall receive an annual compensa-

¹ *Sniffen v Mayor, etc.*, 4 Sandf. (N.Y.) 193.
See also, *post*, §§ 466, 495.

² *Apple v Crawford County*, 105 Pa. St. 300.

The court defined the word "emoluments" as importing "any perquisite, advantage, profit, or gain, arising from the possession of an office."

tion of \$6,000 each, payable quarterly, in lieu of all other compensation, except that they shall receive, in addition to such stated salary, a per diem allowance of \$5 per day, for their reasonable expenses, when absent from home" on judicial business. In 1872, a statute was enacted, providing that each of the justices of the supreme court, should receive \$1,200 annually, "in lieu of and in full of all expenses now allowed by law." A justice of the supreme court, whose term was abridged by his attaining the age of seventy years, applied for a mandamus against the comptroller, to compel the allowance of \$1200 per annum to him, the comptroller having refused to allow more than \$6,000, alleging that the word "compensation," as used in the constitution, meant only that portion of the sum payable to the justice, while he held office, which represented a reward for his services; and that the \$1,200 represented only an allowance for official expenses. The court of appeals held, that there was no distinction between the items: "that the \$7,200 had become a debt from the state, which nothing could extinguish except payment, and which remained such until the official term for which he was elected had expired."¹ On the other hand, it has been held, that a constitutional provision, forbidding the increase or diminution by the county board of a county officer's "compensation," does not apply to allowances for the hire of clerks, fuel, and other official expenses, which may be fixed from time to time, at such sums as may be deemed proper by the county board.²

§ 443. **The right of compensation ; power of legislature to change same.**—It has been often held, that an officer's right to his compensation does not grow out of a contract between him and the state, or the municipality

¹ *People v Wemple*, 115 N. Y. 302, rev'g 52 Hun (N. Y.) 414.

² *Briscoe v Clark Co.*, 95 Ill. 309. *Accord*, *Kirkwood v Soto*, 87 Cal. 394.

by which it is payable. The compensation belongs to the officer, as an incident of his office, and he is entitled to it, not by force of any contract, but because the law attaches it to the office;¹ and although, during the time for which he claims it, he has earned money in other employment.¹ "The prospective salary or other emoluments of a public office are not the property of the officer, nor the property of the state. They are not property at all. They are like daily wages unearned, and which may never be earned. The incumbent may die or resign, and his place be filled, and the wages earned, by another. The right to the compensation grows out of the rendition of the services, and not out of any contract between the government and the officer, that the services shall be rendered by him. They may be paid for in fees at one time, in salary at another, and either may be increased or diminished at any time before they are earned."² Public officers entitled to fees or salaries fixed by law, take their offices *cum onere*, and the legislature may attach additional duties to an office, without increasing the compensation, or change the rate of compensation for official services when they please, whether such compensation is salary, fees, or other remuneration.³ This principle, and its derivative, that the compensation of an officer, not resting in contract, is not protected by the provision in the constitution of the United States or a state constitution, against laws impairing the obligation of contracts, has been fully stated, and fortified by numerous citations, in a former chapter.⁴

¹ *Fitzsimmons v Brooklyn*, 102 N. Y. 536.
Accord, Baxter v Brooks, 29 Ark. 173.
 See also, *Locke v Central City*, 4 Colo.
 65;
Hoboken v Gear, 27 N. J. L. 285;
Steubenville v Culp, 33 Ohio St. 18.

Ruggles, Ch. J., p. 296; *aff'g 2 Sandf.*
 (N. Y.) 355.

² *Turpen v Com'rs*, 7 Ind. 172.
 See also, *People v Burrows*, 27 Barb.
 (N. Y.) 89; 16 How. Pr. (N. Y.) 27;

⁴ See *ante*, § 19.

³ *Conner v Mayor, etc.*, 5 N. Y. 285, per

Nor is a statute, changing an officer's compensation, an *ex post facto* law, within the constitutional prohibition against such statutes.¹

§ 444. **Rule as to officer of municipality, and in cases of professional employment.**—In like manner, a municipal corporation may, at the pleasure of its council or other legislative body, unless its charter, or some other statute governing it, otherwise provides, change the official term, or increase or diminish the compensation of any of its officers, appointed under an ordinance, or impose upon any of them additional duties, without additional compensation.² A case in Massachusetts appears to deny the existence of this rule. There a city council had appointed the plaintiff city engineer for one year, at a salary of \$1,000, and the city was adjudged to be liable to him for the full salary, although the council, before the expiration of the year, had removed him, and appointed another in his place. The court, after saying that the city had no power to shorten a term of office, in the absence of the grant of such power by statute, unless the officer "misbehaves in his office, or otherwise becomes unfit to perform its duties," continued: "The election or appointment, for a definite time, of a city officer or agent, entitled to pay for his services, where no law prescribes a different time for the duration of the office or agency, and an acceptance by him of such office or appointment, constitute, in our judgment, a contract between the city and him, which cannot be dissolved or discharged by the mere will and act of the city." It must be noticed, however, in addition to the distinction, suggested by the court, that there had been no ordinance establishing the office of city engineer,

¹ *People v Devlin*, 33 N. Y. 289, per Potter, J., p. 273.

² *Ante*, § 19.

See also, *Dillon Mun. Corp.*, 4th ed., § 231 (*170);

Hiestand v New Orleans, 14 La. Ann. 329.

and the plaintiff was appointed under a mere resolution of the council, so that the plaintiff seems to have been a professional employee, rather than an officer, of the city. Unless the case can be distinguished upon one of those grounds, it runs contrary to the current of the other authorities.¹

II. Whether a public officer is entitled to any compensation, unless it is given to him by some constitutional or state provision.

§ 445. **Where fees may be allowed by immemorial usage.**—It has been said in England, that the immemorial existence of fees to an office may be presumed by uninterrupted modern usage, unless there is some evidence to the contrary; and that a modern usurpation of an excess will not affect the title to the ancient fees.² But, in the United States, there can be no usage, which of itself will entitle an officer to fees, where they are not expressly allowed by law.³

§ 446. **The general rule in the United States.**—Here the general rule is, that the rendition of the services of a public officer is deemed to be gratuitous, unless a compensation therefor is fixed by statute.⁴ So, a municipal officer has no claim against the municipality for compensation, where no compensation is given to him by statute, or by an ordinance passed pursuant to a power given by

¹ *Chase v Lowell*, 7 Gray (Mass.) 33. Judge Dillon regards this case as having turned upon the ground that the services were professional or private. *Dillon Mun. Corp.*, 4th ed., § 232 (*171).

² *Shephard v Payne*, 16 C. B., N. S., 132; 33 L. J., C. P., 158; 10 Jur., N. S., 540; 10 L. T., 193; 12 W. R. 581.

³ *Albright v Bedford Co.*, 106 Pa. St. 582; *Ogden v Maxwell*, 3 Blatchf. (U. S.) 319. See, however, *Boyden v Brookline*, 8 Vt. 234.

⁴ *State v Frewer*, 59 Ala. 130; *White v Levant*, 78 Me. 568; *Perry v Cheboygan*, 55 Mich. 250; *Wortham v Grayson Co. Court*, 13 Bush (Ky.) 53;

statute.¹ Where the legislature provided by law for the election by the legislature of a prosecuting attorney for a particular county, and fixed his salary, but did not elect the officer; and subsequently passed a joint resolution, authorizing the governor to appoint a person to the office, to hold until further provision of law, "without any compensation from the state;" and the governor appointed a person accordingly, who served two years, and claimed the salary as fixed; it was held that he was not entitled to any compensation.² So, where the statute makes no provision for the payment of a school agent, a promise to pay him by the town, will not be implied by his election and service in that capacity.³

§ 447. Rule applies whether compensation is claimed as salary, fees, or otherwise.—"The rule is inflexible, that an officer can demand only such fees as the law has fixed and authorized for the performance of his official duties." ⁴ This doctrine applies to cases, where the compensation claimed is a salary, payable by the public authorities, or fees, payable either by the public authorities, or by an individual.⁵

¹ *Locke v Central City*, 4 Colo. 65;
Haswell v Mayor, etc., 81 N. Y. 255;
 See also, *Dillon Mun. Corp.*, 4th ed.,
 § 230 (*169), citing *Sikes v Hatfield*, 13
Gray (Mass.) 347;
Barton v New Orleans, 16 La. Ann. 317;
Bosworth v New Orleans, 26 La. Ann.
 494;
Garnier v St. Louis, 37 Mo. 554;
Devoy v Mayor, etc., 39 Barb. (N. Y.)
 169;

² *People v Campbell*, 8 Ill. 466.

³ *Talbot v East Machias*, 76 Me. 415.

⁴ *Crittenden County v Crump*, 25 Ark. 235.

⁵ *Mastin v Cullom*, 28 Ala. 670;
Kahn v Locke, 75 Ala. 332;
Tennessee, etc., R. R. Comp'y v East
Alabama R'y Comp'y, 81 Ala. 94;

Hicks v Moore, 2 Ga. 240;
Price v Cutts, 29 Ga. 142;
Taylor v Co. Com'rs, 110 Ind. 462;
Wood v Co. Com'rs, 125 Ind. 270;
Fawcett v Eberly, 58 Iowa, 544;
Palo Alto County v Burlingame, 71
 Iowa, 201;
Myers v Marshall County, 55 Miss. 344;
Gammon v Lafayette County, 76 Mo.
 675;
Burnham v Bank, 5 N. H. 446;
Anonymous, 22 N. J. L. 211;
Ex parte Minier, 2 Hill (N. Y.) 411;
Croft v Brandt, 58 N. Y. 106; 17 Amer.
 Rep. 213; aff'g 5 Daly (N. Y.) 124; 46
 How. Pr. (N. Y.) 481; 13 Abb. Pr.
 N. S. (N. Y.) 128;
O'Connor v O'Connor, 47 N. Y. Super.
 Ct. 498;

§ 448. **Exceptions recognized in certain cases.**—Nevertheless, some exceptions to this rule have been recognized by adjudicated cases. Thus, where the statute allowed to the sheriff, against a person in contempt, the costs and expenses of the attachment; it was held, that “where the law is silent as to charges for particular services,” the court might allow the sheriff a reasonable compensation.¹ And it was said, in one case, that where the compensation of an officer (in this case the clerk of the district court,) is not fixed by law, at the time when he renders a service, he may demand a reasonable compensation in advance, and may retain in his possession papers and documents, with respect to which he has rendered services, until he is paid such compensation, which may be taxed against the defeated party.² And that, where a statute provides that a board of officers shall have a secretary, and no provision is made for his compensation, he is entitled to a reasonable compensation.³

III. Construction and effect of statutory provisions, granting compensation to public officers.

§ 449. **The effect of the terms, “reasonable compensation,” and “fees,” when used in a statute.**—It has been held, that where a general statute provides, that if an officer or other person shall be required to perform any duty, for which no fee is allowed by law, he shall be entitled to a reasonable compensation; this provision does not embrace services, required to be performed for a state or a county, since it is a rule of statutory construction, that general words, affecting rights and interests, do not

Day v Mayor, etc., 66 N. Y. 592, rev'g 6 Hun (N. Y.) 92;
State v Henderson, 15 Lea (Tenn.) 274;
Hallman v Campbell, 57 Tex. 54;
Boyden v Brookline, 8 Vt. 284.

See also, *post*, § 478, and ch. 20.

¹ Smith v Birdsall, 9 Johns. (N. Y.) 328.

² Ripley v Gifford, 11 Iowa, 367.

³ Territory v Norris, 1 Oreg. 107.
See further, *post*, ch. 20.

include the state, or affect its rights, unless it is especially provided, or is made clear by implication, that the state is included; and that the same rule applies to a county, which is a component and essential part of the state, and a necessary agent of the government thereof.¹ A statute, conferring upon a city power to allow its attorney "fees," authorizes it to allow him a commission or percentage upon all money collected by him for the use of the city, and an ordinance granting such an allowance applies to money collected in either civil or criminal cases.²

§ 450. **Effect of statute requiring compensation to be collected in a particular manner.**—Where the statute, under which an officer is appointed or performs his services, provides for compensating him in a particular manner, he is confined to that manner, unless it fails to provide for his compensation, through the fault of the body responsible for the same. Thus, where the charter of a city provided that the city surveyor should be compensated for his services, in the matter of laying out, paving, and grading streets, etc., out of the money raised by assessment on the property benefited by the improvements; it was held, that he could not maintain an action against the city for his services, until the money had been collected by such assessments, unless the city was in default, for not proceeding with due diligence to make and collect the assessments.³

¹ *Cole v White County*, 32 Ark. 45;
Wortham v Grayson County Court, 13
Bush (Ky.) 53.

² *Austin v Johns*, 62 Tex. 179.

³ *Baker v Utica*, 19 N. Y. 326.
Cumming v Mayor, etc., 11 Paige
 (N. Y.) 596.
 See also, *Dillon Mun. Corp.*, 4th ed.,

§ 230 (*169), citing *McClung v St.*
Paul, 14 Minn. 420;
Jersey City v Quaife, 26 N. J. L. 63;
People v Supervisors, 1 Hill (N. Y.) 332;
Smith v Comm. 41 Pa. St. 335;
Andrews v United States, 2 Story
 (U. S.) 202;
United States v Brown, 9 How. (U. S.)
 487.

§ 451. **Effect of statute allowing policemen salary, not over a specific sum.**—Where the charter of the city of Albany provided, that “each patrolman of the police force shall receive an annual salary of not over \$900;” and gave the commissioners of police general power, to adopt rules and regulations for the government and discipline of the force, to define and enumerate the powers and duties of the members of the force, and to provide for their appointment and removal; it was held, that this did not give them power to divide the patrolmen into two or more distinct grades, to one of which should be attached a salary of \$900, and to the other a salary of \$600; that although they might fix the salaries of the patrolmen at a less sum than \$900, each of the patrolmen was entitled to the same salary; and accordingly a mandamus was granted, on the application of a patrolman whose salary had been reduced, requiring the commissioners to certify and allow to the relator the full salary of \$900.¹

§ 452. **Gross sum in lieu of statutory fees.**—To this branch of the subject belong a class of cases, where an officer has been required, by contract or by municipal ordinance, to accept a gross sum, in lieu of the fees allowed to him by law. An English case, where such a bargain, between a municipal corporation and its officer, was decreed in equity to be unlawful, as being against public policy, on the ground that the law would not allow any bargain to be made, respecting an appointment to a public office, and also because the officer “is considered to require them” (his fees) “to enable him to uphold the dignity and perform the duties of his office,” was fully cited in a former chapter.² And it was held in Louisiana,

¹ *People v Police Com'rs*, 108 N. Y. 475, apparently overruling, *People v Police Com'rs*, 46 Hun (N. Y.) 476.

² *Liverpool v Wright*, 1 Johns. 359;

28 L. J., Ch. 868; 5 Jur. N. S. 1156; followed, *Dublin (Mayor of) v Hayes*, 10 Irish R., Com. Law Series 226, cited with other cases *in pari materia*, in ch. 6, *ante*, §§ 52, 53.

that the sheriff of a parish cannot be compelled, without his consent, to accept a gross sum, in lieu of his statutory fees.¹ So a contract to that effect was adjudged to be void in Iowa.² But in Texas it has been held that such a contract is lawful.³

§ 453. **The same subject; effect of acceptance of gross sum.**—In New York, where a person was nominated by the mayor of a city for the office of city treasurer, the compensation of which was fixed by statute at a certain percentage upon all his payments; and, before he was confirmed by the board of aldermen, certain of the aldermen required him to execute a written agreement to accept a fixed sum, in lieu of the statutory compensation, and to pay the excess of his commissions into the city treasury; which he did, and was thereupon confirmed, and held the office for more than four years, drawing only the fixed compensation; and, at the annual session of the legislature, next succeeding his appointment, a statute was passed, permitting the common council thus to fix the treasurer's compensation; it was held that the plaintiff could not recover from the city the excess of his commissions above the salary, since the transaction was legal, after the statute, and "the agreement to limit, made when there was no power, could be and was adopted, after the law was passed, by the acts of the parties;" and thus the voluntary payment created an estoppel, which prevented the recovery back of the money paid.⁴ Upon appeal, the decision was affirmed, on the ground that the agreement was executed, not executory, and the annual settlements of the plaintiff's accounts, in pursuance thereof, consti-

¹ *State v Fisher*, 30 La. Ann. Part I, 514.

² *Gilman v Des Moines Valley R. R. Comp'y*, 40 Iowa 200.

See also, *Carrothers v Russell*, 53 Iowa 346;

Hawkeye Ins. Comp'y v Brainard, 72 Iowa 130.

³ *McInery v Galveston*, 58 Tex. 334.

⁴ *Hobbs v Yonkers*, 32 Hun (N. Y.) 454.

tuted a release of the plaintiff's right to any additional compensation, and an estoppel.¹ And where an officer released all his claims for salary, in consideration of a gross sum, it was held, that the release could not be impeached, by proof that it was made before his election, in order to induce the electors to vote for him.²

IV. Construction and effect of constitutional and statutory provisions, fixing, or allowing an officer or a board of officers to fix, another officer's compensation; or making, or allowing an officer or a board to make, an increase or diminution of such compensation.

§ 454. **Whether power to fix is or is not continuous.**—In some of its aspects, this subject depends upon principles, closely analogous to those considered under the last preceding division. In a recent decision of the New York court of appeals, a question arose, whether or not a statutory provision, conferring a power of this character conferred a continuous power, and what were the rights of those who had acted under an exercise of the power. In the year 1860, a statute was enacted, imposing certain additional duties upon the police justices of the city of New York, and, by reason thereof, authorizing the common council to increase their salaries. Accordingly, in December, 1862, the common council fixed the salaries of the police justices at \$5,000. In 1869, a statute was enacted, forbidding the common council to increase any salaries, "except as provided by acts passed by the legislature." In December, 1869, the common council adopted a resolution, fixing the salaries of the police justices at \$10,000, from January 1, 1870. The plaintiff, who was then a police justice, was paid at the rate of

¹ *Hobbs v Yonkers*, 102 N. Y. 13, at p. 17, distinguishing the case from *People v Board of Police*, 75 N. Y. 38, and other cases *in pari materia*, cited un-

der the next succeeding division of this chapter, *q. v.*

Harvey v Tama Co., 53 Iowa 228.

\$10,000 from January 1, 1870, till August 1, 1871, and after the latter date, during his incumbency of the office, at the rate of \$5,000. He brought this action to recover the difference between the two rates; and it was held that he could not recover; that the act of 1860 authorized only one increase, so that the power of the common council was exhausted by the resolution of 1862, and the resolution of 1869 was invalid. But it was also held, that the city could not set up, as a counter claim, the excess paid over the lawful salary, from January 1, 1870, to August 1, 1871; since the money was received by the plaintiff, and was paid by the city, in good faith, and in the belief that the increase had been lawfully made, and the payments were voluntary on the part of the city.¹

§ 455. **Constitutional compensation; "stated salaries;" by whom paid; pensioning judges.**—Where the compensation of an officer is fixed by the constitution, the legislature cannot increase or diminish it.² And it has been held, that where the constitution fixes an officer's compensation at a definite sum, it may be paid without a legislative appropriation, although another provision of the constitution declares, that no money shall be paid out of the public treasury, without an appropriation by statute; for the constitutional direction to pay the salary is an appropriation of the money to pay the same.³ Where the constitution directs that county officers shall receive "stated salaries" from their respective counties, a statute, providing for paying them, by the state, is unconstitutional.⁴ So a statute, fixing the compensation of county officers, is unconstitutional, where the constitution provides that such salaries shall be fixed by the county board.⁵ Under the constitution of the state of New

¹ *Cox v Mayor, etc.*, 103 N. Y. 519, aff'g 23 Week. Dig. (N. Y.) 355.

² *State v Weston*, 6 Nebr. 16.

⁴ *State v Barnes*, 24 Fla. 29.

⁵ *Ante*, § 19

⁵ *Wulff v Aldrich*, 124 Ill. 591.

York, which, after forbidding a judge to hold office after he shall have attained the age of seventy years, declares that "the compensation of every judge of the court of appeals, and of every justice of the supreme court, whose term of office shall be abridged pursuant to this provision, and who shall have served as such judge or justice ten years or more, shall be continued during the remainder of the term for which he was elected;" it is not necessary, in order to entitle the retired judge or justice to his continued compensation, that the ten years' service should have been performed in the term so abridged; it suffices that he has served ten or more successive years, although part of such service may have been performed during a previous term.¹

§ 456. **Officer cannot be required to accept less than sum fixed by law.**—A board of officers, having the power of appointment to an office, cannot reduce the amount, fixed by law as the salary of the office, or make a binding contract, with the person appointed to fill it, to perform its duties at a less sum; and the acceptance of the office by him, and his discharge of the duties thereof, do not constitute a binding contract to accept such reduced sum, or a waiver of the statutory provision; but he can afterwards enforce his right to the statutory salary, by mandamus, or other appropriate legal proceeding.² But where the officers authorized by law to appoint, are also empowered by law to fix the compensation, they may increase or reduce the compensation.

¹ *People v Wemple*, 125 N. Y. 485, aff'g 58 Hun (N. Y.) 275.

² *People v Board of Police*, 75 N. Y. 33, rev'g 12 Hun (N. Y.) 653.
Accord, *Hawkeye Ins. Co. v Brainard*, 72 Iowa, 130;
Purdy v Independence, 75 Iowa, 356;
Kehn v State, 93 N. Y. 291;
Adams v United States, 20 Ct. of Cl.

(U. S.) 115;

Dyer v United States, 20 Ct. of Cl. (U. S.) 166;

Stocksdale v United States, 39 Fed. R. (U. S.) 62.

See also, *Carrothers v Russell*, 53 Iowa 346;

State v Collier, 72 Mo. 13;

State v Purdy, 36 Wis. 213.

Thus, where the board of fire commissioners of the city of New York, who are prohibited from making removals except after notice, and a hearing upon charges, transferred an assistant engineer to the place of machinist, at a lower salary; it was held, that this was not a removal within the statute, and the transfer could be made without notice or a hearing; and the person so transferred, after accepting the reduced compensation, had no remedy for the balance, the fire commissioners having, by the statute, the power to fix the salaries of their subordinates.¹

§ 457. **When district attorney may reduce subordinates' compensation.**—Where the board of supervisors of a county, having power to fix, from time to time, the compensation of the district attorney, his assistants, clerks, and officers, fixed the salary of the chief clerk to the district attorney at \$3,000; and, three months afterwards, the board fixed the sum, to be raised for salaries in the district attorney's office for the succeeding year, at a much smaller sum than had been allowed for that purpose in the preceding year; and afterwards, a new district attorney was elected, who reduced all the salaries in his office, so as to correspond to the diminished sum allowed for that purpose, fixing that of the chief clerk at \$1500, and appointed the relator to that position; and the latter entered upon the duties of that office, and served three years, receiving a salary at that rate, and then applied for a mandamus, to compel the supervisors to allow him the difference between the salary so received, and the salary as fixed by their resolution; it was held, that the action of the supervisors, in diminishing the allowance, impliedly conferred upon the incoming district attorney power to reduce all the salaries in his office,

¹ *Riley v Mayor, etc.*, 96 N. Y. 331, *aff'd* 49 N. Y. Super. Ct. 537. Followed, *Morris v Mayor, etc.*, 99 N. Y. 645.

Accord, Monroe v Mayor, etc., 28 Hun (N. Y.) 258.

so as to bring the aggregate within the diminished sum allowed; and that the relator, having accepted the appointment at the salary so reduced, and received the money during his term of service, was concluded, and so was not entitled to the mandamus.¹

§ 458. **Power to change, not power to abolish, or make nominal.**—Where a city charter provided, that the compensation of the mayor should be \$2400 per annum, and might be changed by ordinance, but not during his term of office; it was held, that an ordinance, providing that after the expiration of the term of the mayor then in office, the mayor should serve without compensation, was void; and that the mayor thereafter elected was not estopped from claiming the salary, by the fact that he knew of the ordinance, nor by a public statement, made while he was a candidate, that if he should be elected, he would serve without compensation. And accordingly, the court granted a mandamus, to compel the city council to raise the money. The court said: “If the council can deprive the mayor and the board of public works” (respecting the members of which the charter contained a similar provision), “of all compensation, then it has the power so to emasculate those departments of the government, that all vigor and efficiency will be gone, and the government of the city will be left practically in the hands of the council.” And in answer to the argument, that the council might, under the statute, practically accomplish the same result, by reducing the salary to a mere nominal sum, the court said: “This is an argument often resorted to, and no argument is more fallacious. . . . When officials are advised of the fact, that their power over a given matter is not absolute, but that they have a trust to discharge, a court will never presume that they will abuse that trust. If the city council should

¹ *People v Supervisors*, 105 N. Y. 180, aff'g 38 Hun (N. Y.) 373.

ever attempt to abuse their trust, it will be time enough then to decide, whether their action in the exercise of a clearly vested power is final, and not subject to revision by any tribunal; whether the only remedy left is by appeal to the electors at the ballot box. It might be that an ordinance, reducing the mayor's salary to a nominal amount, would be unreasonable and void; or that an ordinance, increasing it to an exorbitant amount, would likewise be invalid. . . . But, as stated, it is not necessary to decide this point." ¹ So, where a statute provided for the appointment of a health officer in each county, and that the board of supervisors of the county should fix his salary; and, in a particular county, the board fixed the salary at \$15 per month, and two years afterwards reduced it to \$1 per month; but the person appointed continued to serve, and then brought an action against the supervisors to recover on a quantum meruit, and the jury found in his favor at the rate of \$15 per month; the judgment on the verdict was affirmed, the court holding that the action of the supervisors was practically an attempt to oust the plaintiff from his office, and that "such action was a nullity, and the salary previously fixed by the board was not thereby changed." ²

§ 459. **As to salaries of city officers, and the fixing and payment thereof.**—A statute, providing that the salary of an officer shall be fixed by the common council of a city, and paid by the supervisors of the county, is constitutional, and under such a statute, the supervisors have no power to change the salary.³ And a power, conferred on the board of apportionment of the city of New York, "to regulate the salaries of officers and employees of the city and county governments," does not empower them to

¹ *State v Nashville*, 15 Lea (Tenn.) 697.

See also, *Carr v St. Louis*, 9 Mo. 190.

² *De Soto County v Westbrook*, 64 Miss. 312.

³ *People v Auditors, etc.*, 13 Mich. 233.

reduce the salary of an assistant district attorney, since the district attorney, and consequently his assistant, are state and not county officers.¹

§ 460. **Salary payable out of fees.**—A statute, fixing the salary of a county clerk, and providing that he shall “collect all official fees, and on the first day of every month, pay the same over to the county treasurer, less his salary for the next preceding month,” does not limit the salary to the amount of fees received.² Where, under such a statute, the clerk has received the full amount of his salary, his successor is entitled to collect the uncollected fees.³

§ 461. **Insufficient appropriations; appropriation to pay one who holds three offices.**—Where the salary of an officer is fixed by law, and the legislature appropriates a smaller sum for his salary, without any provision declaring it to be in full for his salary, or repealing the provision fixing his salary; this is merely an insufficient appropriation, not a reduction, and the officer is still entitled to the difference.⁴ So the appropriation, for payment of the salary of a municipal officer, of a smaller sum than he had before received, does not itself reduce his salary.⁵ And not only does an insufficient appropriation fail to effect a reduction of the salary, but the officer is not precluded from claiming the difference, by his continuance to serve, and accepting the smaller sum.⁶ But where the statute shows that the legislature intended to make the reduction, he can have only the smaller sum, although the result is accomplished by a smaller

¹ *Fellows v Mayor, etc.*, 8 Hun (N. Y.) 484.

² *Sewell v Placer County*, 42 Cal. 650.

³ *Thornton v Thomas*, 65 Mo. 272.

⁴ *French v United States*, 16 Ct. of Cl. (U. S.) 419.

⁵ *Fountain v Jackson*, 50 Mich. 260.

⁶ *Langston v United States*, 21 Ct. of Cl. (U. S.) 10; *aff'd*, p. r., 118 U. S. 389. Accord, *State v Steele*, 57 Tex. 200; *State v Cook*, 57 Tex. 205.

appropriation only.¹ Where an appropriation is made *in solido*, to pay a state officer who holds three offices, it has been held, that his successor in two of them only is not entitled to any of the money.*

§ 462. Rules where statute provides one officer's salary shall be same as another's; foreign minister.—It was held, in Iowa, that where a statute provides that the salary of the clerk at A shall be the same as that of the clerk at M, and a subsequent statute increases the salary of the clerk at M, that does not increase the salary of the clerk at A.³ But in Texas, it was held, that where a statute provides that a certain judge “shall receive the same salary as the judges of the district courts,” and a subsequent statute reduces the salaries of the judges of the district courts, that reduces to the same extent the salary of the first named judge.⁴ Where a general statute provides, that a city marshal shall have the same duties and responsibilities as a sheriff, and shall be entitled to the same fees, that does not permit him to recover from the county fees for services in criminal cases, since the presumption is that a city officer is to be paid by the city and not the county, and this presumption must prevail, in the absence of an express statutory provision to the contrary, although services of that character are generally chargeable to the county.⁵ A foreign minister of the United States is entitled to receive the sum fixed for his salary, in the money of the United States, or its market equivalent.⁶

¹ United States v Mitchell, 109 U. S. 146, rev'g s. c., p. r., 18 Ct. of Cl. (U. S.) 281. See also, People v Supervisors, 105 N. Y. 180, cited *ante*, § 457; United States v Fisher, 109 U. S. 143; Beaman v United States, 19 Ct. of Cl. (U. S.) 5, cited *ante*, § 310.

² State v Hallock, 19 Neva. 371.

³ Kinsey v Sherman, 46 Iowa 463.

See also, Johnston v Lovett, 65 Ga. 716.

⁴ State v Cook, 57 Tex. 205.

⁵ Christ v Polk County, 48 Iowa 302.

⁶ Clay v United States, 8 Ct. of Cl. (U. S.) 209.

§ 463. **Effect of requirement that salary shall be fixed before appointment.**—A statute, requiring that “the compensation or salary of any officer” of a city “shall be fixed before his appointment,” does not require that it shall be fixed in advance, whenever a new appointment to the office is made: where it has been once properly fixed, that is sufficient for each successive appointment, until it is changed.¹

§ 464. **As to reduction and changes in fees and salary, and the time of payment thereof.**—Where a board has power to reduce an officer's salary, a resolution that it be “fixed” at a certain sum, less than that before paid, is a reduction, without the use of the word “reduce,” or any equivalent expression.² The reduction of an officer's salary, by a board authorized to reduce it, may be effected by clear implication, as well as by an actual resolution to reduce it.³ Where a statute provides, that the salaries of members of the fire department of a city “shall be fixed by the board of fire commissioners, subject to approval by a majority vote of the common council;” and the board pass a resolution to fix the salaries of a certain class of the members, at a certain sum for each man, subject to the approval of the common council; and the common council pass a resolution, approving of such fixing of the salaries at a specified sum for each man, less than the sum designated by the board; the effect is that no salary is fixed, since the common council has power only to approve or disapprove the action of the fire commissioners, not to originate a measure to fix the salaries.⁴ Where a statute gives fees to a sheriff, “in such sum as the court shall order,” there must be an order of the court fixing his fees, before he is

¹ *People v Crissey*, 91 N. Y. 616, at p. 637.

fully *ante*, § 457.

² *Taylor v Mayor, etc.*, 67 N. Y. 87.

⁴ *McCormick v Syracuse*, 25 Hun (N. Y.)

³ *People v Sup'rs*, 105 N. Y. 180, cited

300.

entitled to any fees.¹ A statute, fixing an officer's salary at a certain sum for each month, entitles him to monthly payments thereof.

V. Construction and effect of constitutional or statutory provisions, forbidding an increase or diminution of an officer's compensation.

§ 465. **Validity as respects time; effect of receiving reduced amount.**—In the United States, such provisions are very frequently found in the constitutions of the several states, and in statutes defining the powers and duties of municipal bodies, or the boards or officers thereof; and are usually made applicable to an increase or diminution during the term held by the officer at the time. Where the provision prohibits such increase or diminution “during his continuance in office,” this applies only to the term held by the officer, when the proposed increase or diminution is made, not to a term thereafter held by him by virtue of a new appointment or reelection.² But such a statute cannot be evaded by the resignation of the incumbent, during his term, and his reappointment to the same office.³ Where a statute authorized the county commissioners to fix the salary of the district attorney, from time to time, but forbade any alteration thereof during his term; and, the salary having been previously fixed by them, on the day when a new district attorney's term began, and about an hour after he had qualified, the commissioners resolved that the salary should be reduced; it was held that this action was void, and that the district attorney was entitled to recover against the county, the amount of the former salary.⁴ So, where an increase of compensation was made three days after an officer's

¹ *Shumway v Leakey*, 73 Cal. 280.

² *Carroll v Siebenthaler*, 37 Cal. 193.

³ *Smith v Waterbury*, 54 Conn. 174.

⁴ *State v Hudson County*, 44 N. J. L. 388.

⁵ *Polk v Minnehaha Co.*, 5 Dak. T. 129.

See also, *Milner v Reibenstein*, 85 Cal. 593.

election, it was held that he was not entitled to it during the term which he had then begun to run, but that he became entitled to it upon his reëlection.¹ An officer, appointed to fill a vacancy for the unexpired portion of a term, is not entitled to an increase of salary, voted after the beginning of his predecessor's term, and before the vacancy occurred.² Where a reduction has been made, in contravention of a constitutional prohibition, the officer, by accepting the reduced salary, is not precluded from collecting the difference between the reduced and the original salary; there is no doctrine of waiver or estoppel which prevents him from doing so.³

§ 466. **When constitutional prohibition does not apply.**—A constitutional provision, against increasing or diminishing the "salaries" of particular officers, does not prevent the legislature from enacting, that such salaries shall be paid in United States legal tender notes, although such notes are depreciated with respect to coin.⁴ Nor does it prevent an allowance for expenses.⁵ Nor does it prevent a change of compensation, where the compensation is a percentage or commission upon money received or disbursed by an officer.⁶ And it has been held, that a constitutional provision, forbidding an increase or reduction of the "compensation" of any officer during his term, does not apply to sheriffs, clerks, constables, and other officers, who are compensated by fees, or to treasurers and other officers, who are compensated by percentages or commissions.⁷

§ 467. **The same; ordinance passed before, but in effect after, commencement of term.**—In order that a consti-

¹ *Weeks v Texarkana*, 50 Ark. 81.

² *Larew v Newman*, 81 Cal. 588.

³ *Montague v Massey*, 76 Va. 307;
Neal v Allen, 76 Va. 437, and cases cited
in the preceding notes. See also,
post, ch. 21.

⁴ *State v Rhodes*, 3 Neva. 240.

⁵ *Kirkwood v Soto*, 87 Cal. 394.
See also, *ante*, § 442.

⁶ *Thompson v Phillips*, 12 Ohio St. 617.

⁷ *Milwaukee County v Hackett*, 21 Wis.
618.

tutional or statutory provision, forbidding the increase or diminution of an officer's compensation, should apply to a particular officer's compensation, it is necessary that such compensation should have been definitely fixed, before the passage of the statute, ordinance, or resolution, purporting to make the change.¹ Thus in Pennsylvania, where a statute gave to the court of quarter sessions, authority to fix the sheriff's compensation for boarding prisoners, and the court had never before permanently fixed it, but had allowed the preceding sheriff a certain rate, at the close of his office, and on the settlement of his accounts; it was held, that a constitutional prohibition against increasing or diminishing the "salary or emoluments" of an officer, after his election or appointment, did not apply to an order, fixing the new sheriff's compensation for that service, at a lower rate, since the former action related to the allowance to the preceding sheriff, and was not general.² So, such a constitutional prohibition does not prevent the fixing by ordinance of the salary of a municipal officer, where, at the time when he was elected, there was no ordinance fixing his compensation, and such an ordinance was passed afterwards.³ And where a statute, applicable to a municipal corporation, contains such a prohibition, respecting the salaries of the municipal officers; if, after the passage of an ordinance fixing the salary, a person is elected to the office, his salary is fixed thereby, although the ordinance did not take effect until after the beginning of his term. in consequence of a requirement that it should be published a certain length of time, before it could take effect.⁴

¹ *Rucker v Supervisors*, 7 W. Va. 661.

² *Peeling v York County*, 113 Pa. St. 108, approving and distinguishing *Apple v Crawford County*, 105 Pa. St. 300; cited *ante*, § 441.

³ *State v McDowell*, 19 Nebr. 442; *Wheelock v McDowell*, 20 Nebr. 160. Accord, *Purcell v Parks*, 82 Ill. 346.

⁴ *Stuhr v Hoboken*, 47 N. J. L. 147.

§ 468. **The same; imposition of additional duties; duties belonging to office.**—Where the legislature enacts a statute, imposing upon the attorney-general, the duties of a member of the board of examiners, and he performs them, a statute awarding him a compensation for the performance of such duties, in addition to his salary as attorney-general, is not within a constitutional prohibition of the increase or diminution of an officer's compensation, because this was not a duty pertaining to his office.¹ But such a prohibition applies to an attempt of a city council, to pay a committee of its members, for services which have been ordinarily rendered without compensation.²

§ 469. **As to absence of certain judges, and judge holding another's term.**—A constitutional provision, forbidding the increase or diminution of the compensation of judicial officers, during their respective terms, renders unconstitutional a statute, authorizing a certain deduction from the salary of a judge, by reason of his failure to attend, and hold the courts to which he was assigned.³ But a statute, providing that where a special judge holds a court, he shall receive no compensation, unless the regular judge orders his compensation to be paid out of his own salary, is not unconstitutional within such a provision.⁴

§ 470. **Application to city ordinances, county officers, and officer holding under good behavior.**—A constitutional provision that no "law" shall be passed, increasing or diminishing salaries during the terms of officers, does not apply to a city ordinance, making such an increase or diminution.⁵ Nor does it apply to county commissioners or county auditors, authorized to regulate the salaries of

¹ Love v Baehr, 47 Cal. 364.

(Ky.) 150.

² Garvie v Hartford, 54 Conn. 440.

⁴ Pickard v Henderson, 15 Lea (Tenn.) 430.

³ Garrard v Nuttall, 2 Met. (Ky.) 106.

See also, *post*, §§ 500, *et seq*.

See also, Auditor v Adams, 13 B. Mon.

⁵ Baldwin v Philadelphia, 99 Pa. St. 164.

county officers.' But it applies to an officer holding during good behavior.*

§ 471. **Application to a chartered city reorganized under a general law.**—Where a general statute forbade the increase or diminution of the salary of any officer, during his term of office, and a city, organized under a special charter, abandoned its organization and reorganized under the general law, as it was provided in that law, that such a city might do; and the marshal, holding under the old charter, was elected under the new charter, and so continued to discharge the duties of his office without interruption; it was held, that the new council had no power to diminish his salary, for the term for which he was first elected.³

VI. Times of the beginning and the ending of an officer's compensation

§ 472. **An officer is entitled to salary from beginning of term, after qualification.**—An officer is not entitled to his salary, until he has taken the oath of office, and given the official bond, if a bond is required.⁴ But, although the law requires a government officer (in this case an internal revenue collector) to give a bond and take an oath, before entering upon his official duties, he may have his compensation from the time when he entered upon his duties, and his services were accepted by the government, although the oath was taken and the bond was given afterwards. The court said: "We are of opinion, that the statute was satisfied by holding that his title to receive, retain, or hold, or appropriate, the commissions as compensation, does not arise, until he takes and subscribes the oath or affirmation; but that, when he does so, his compensation

¹ Crawford County v Nash, 99 Pa. St. 253.

² Cox v Burlington, 43 Iowa 612.

³ Wright v Hartford, 50 Conn. 546.

⁴ Williams v United States, 23 Ct. of Cl. (U. S.) 46.

is to be computed . . . from the time when, under his appointment, he began to perform services.”¹ The effect of a failure to take the official oath, and to give the official bond has been fully considered in a former chapter.² Where an officer is nominated for promotion, on condition of passing an examination, he is not entitled to the salary of the new office, until he passes the requisite examination, as, until that time, he is not an officer, either *de jure* or *de facto*.³

§ 473. **Entitled only while he is actual incumbent of office.**—As a general rule, an officer is entitled to his official compensation, only for the time during which he was the incumbent of the office.⁴ “A person is not entitled to the salary of a public office, unless he both obtains and exercises the office.”⁵ The exceptions to this rule, as where an officer is unlawfully removed, and procures a restoration by legal proceedings, and the cases where a rightful officer is kept out of office by a usurper, will be considered in a subsequent chapter.⁶

§ 474. **Compensation ends when term ends.**—An officer’s compensation ends, when his term of office ends, whether that event occurs by expiration of time, or by death, removal, or resignation. Where the charter of a city empowered the head of each department of the city government, to “nominate, and by and with the consent of the board of aldermen to appoint,” subordinates, and contained no provision for their removal, or for their terms of office; it was held, that a subordinate might be removed by the head of the department, and another person

¹ *United States v Flanders*, 112 U. S. 88.

² *Ante*, ch. 11.

³ *Crygier v United States*, 25 Ct. of Cl. (U. S.) 238.

⁴ *Auditors, etc., v Benoit*, 20 Mich. 170.

⁵ *Farrell v Bridgeport*, 45 Conn. 191.

See also, *Dillon Mun. Corp.*, 4th ed.

§ 235 (*174) note on p. 318, citing also, *Queen v Atlanta*, 59 Ga. 318;

Mayor, etc., v Fahm, 60 Ga. 109;

Nolan v New Orleans, 10 La. Ann. 106.

⁶ *Post*, ch. 21.

nominated in his place; but that, until the consent of the board of aldermen had been given, the removal and appointment did not take effect, and until then the incumbent was entitled to his salary.¹ There is no rule of law, that an officer, whose salary is payable quarterly, who is removed during a quarter year, is entitled to his salary for the entire quarter.²

§ 475. **Where office abolished, compensation ends.**—Where an office is abolished, the incumbent is not entitled to compensation for his unexpired term; his right thereto ceases with the cessation of his incumbency.³ And this is the rule, although the money to pay the salary for a longer time has been appropriated.⁴

§ 476. **An exception, where officer, whose office was abolished, was allowed a year's salary.**—One exception only to this rule has been recognized, and that was presented in a case, decided by the supreme court of Ohio. Where the relator, the reporter for the supreme court, was required to attend the sessions of the court, and report the cases decided, and was allowed by law an annual salary; and only one term of the court was held during the year, the court itself, as well as the relator's office, having been abolished during the year; at which term the relator attended, and he faithfully reported all the cases decided thereat; it was held that he was entitled to his full salary for the year. Bartley, Ch. J., delivering the opinion of the court, said: "Where the duties of a public officer, entitled to an annual salary, continue through the entire year, the salary accrues and becomes payable for the space of time only, during which the duties are required to be performed; and a repeal of the law

¹ *White v Mayor, etc.*, 4 E. D. Smith (N. Y.) 563.

² *United States v Smith*, 1 Bond (U. S.) 68.

³ *Jones v Shaw*, 15 Tex. 577.
Accord, *Bailey v State*, 56 Miss. 637;
State v Gaines, 2 Lea (Tenn.) 316.

⁴ *Hall v State*, 39 Wis. 79.

creating the office, before the expiration of the year, would stop the accruing compensation, at the time when the duties of the office ceased. But where the duties of an officer, entitled to an annual salary, are of such a nature, that all his duties for the year may be performed and completed within less time than the year, the compensation for the entire year would be payable, in case the duties required by law for the year are performed, although the office might be abolished before the end of the year; and, in such a case, where there is only a partial performance before the abolishment of the office, the compensation should be apportioned to the duties performed, and not to the lapse of time.”¹

¹ *Ex parte Lawrence*, 1 Ohio St. 431.

CHAPTER XX

WHEN AN OFFICER MAY OR MAY NOT HAVE COMPENSATION, IN EXCESS OF THAT FIXED BY LAW

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I. General rules respecting additional compensation to a public officer.

§ 477. **The common law rule as to promise to pay officer for official services.**—At common law, it has been uniformly held, that a promise to pay money to a public officer, for doing that which the law would not suffer him to take anything for doing, or to pay him more than the law allowed, was void, however freely and voluntarily made; for, as Sergeant Hawkins said, if it should be once allowed that such promises would sustain an action, the people would be quickly given to understand how kindly they would be taken; and happy would that man be, who could have his business well done without them.¹

§ 478. **Compensation given by law is in full of officer's official services.**—It results from the proposition, stated and illustrated in the last chapter, that an officer is not entitled to compensation, unless it is given to him by the constitution or a statute, that where a compensation is thus given, whether by salary, or by fees, or by commissions, or otherwise, it is in full of all his official services; and he is not entitled to demand or receive any additional compensation, from the public or from an individual, for any service within the line of his official duty; although his duties have been increased, or entirely new duties have been added, since he assumed office; or, if his compensation consists of fees, although the service is one for which no fee is provided by law. And this proposition is declared and illustrated in numerous American authorities.²

¹ Hawk., P. C., ch. 68, § 4.

See also, *Morris v Burdett*, 1 Campb. 218;

Bilke v Havelock, 3 Campb. 374;

Batho v Salter, Latch 54; *W. Jones*, 65;

Lane v Sewell, 1 Chitty 175;

Dew v Parsons, 1 Chitty 295;

Bridge v Cage, Cro. Jac. 103;

Stotesbury v Smith, 2 Burr. 924; 1 W. Blackst. 204.

² *State v Brewer*, 59 Ala. 130;

Heslep v Sacramento, 2 Cala. 580;

Stockton v Shasta County, 11 Cala. 113;

§ 479. **Effect of imposition of additional duties and extraordinary risks.**—Thus, to illustrate the application of the rule in a few special cases, where the legislature

Rowe v Kern County, 72 Cal. 353;
Decatur v Vermillion, 77 Ill. 315;
Sidway v South Park Com'rs, 120 Ill. 496;

Jay County v Templer, 34 Ind. 322;
Stropes v Co. Com'rs, 84 Ind. 560;
Nowles v County Com'rs, 86 Ind. 179;
Bynum v County Com'rs, 100 Ind. 90;
County Com'rs v Harman, 101 Ind. 551;
Vandercook v Williams, 106 Ind. 345;
Williams v Segur, 106 Ind. 368;
McDonald v Woodbury Co., 48 Iowa 404;
Fawcett v Woodbury Co., 55 Iowa 154;
Griffin v Clay Co., 63 Iowa 413;
Owens v Gatewood, 4 Bibb (Ky.) 494;
Wortham v Grayson Co. Court, 13 Bush (Ky.) 53;

Talbot v East Machias, 76 Me. 415;
White v Levant, 78 Me. 568;
Comm. v Cony, 2 Mass. 523;
Briggs v Taunton, 110 Mass. 423;
New Haven, etc., Comp'y v Hayden, 117 Mass. 433;

Brophy v Marble, 118 Mass. 548;
Walker v Cook, 129 Mass. 577;
People v Supervisors, 36 Mich. 10;
Gerken v Sibley Co., 39 Minn. 433;
State v Holladay, 67 Mo. 64;
Raymond v County Com'rs, 5 Mont. 103;
Territory v Carson, 7 Mont. 417;
Bayha v Webster County, 18 Nebr. 131;
Gilmore v Dodge, 58 N. H. 93;
Rindge v Lamb, 58 N. H. 278;
Evans v Trenton, 24 N. J. L. 764;
Mallory v Sup'rs, 2 Cow. (N. Y.) 531;
People v Sup'rs, 1 Hill (N. Y.) 362;
Palmer v Mayor, etc., 2 Sandf. (N. Y.) 318;

Bruns v Mayor, etc., 6 Daly (N. Y.) 156;
Wendell v Brooklyn, 29 Barb. (N. Y.) 204;
Cowan v Mayor, etc., 6 T. & C. (N. Y.) 151; 3 Hun (N. Y.) 632;
In re N. Y. Cent. & C. R. R. Comp'y, 7 Abb. N. C. (N. Y.) 408;
Perkins v Proud, 62 Barb. (N. Y.) 420;

Oakley v Mayor, etc., 4 Hun (N. Y.) 72;
 6 T. & C. (N. Y.) 221;
Poughkeepsie v Wiltsie, 36 Hun (N. Y.) 270;

Haswell v Mayor, etc., 81 N. Y. 255;
Sup'rs v Jones, 119 N. Y. 339;
State v Johnson, 101 N. C. 711;
Andrews v United States, 2 Story (U. S.) 202;

United States v Averill, 130 U. S. 335;
Converse v United States, 21 How. (U. S.) 463;

Jackson v United States, 8 Ct. of Cl. (U. S.) 354;

Gray v United States, 23 id. 323;

Massing v State, 14 Wis. 502;

Jones v Sup'rs, 14 Wis. 518.

See also, *Dillon Mun. Corp.*, 4th ed., § 233 (*172), citing, in addition to several cases cited in this note, *Andrews v Pratt*, 44 Cal. 309;

Butler v Neosho County, 15 Kan. 178;
Covington v Mayberry, 9 Bush (Ky.) 304;

Bright v Sup'rs, 18 Johns. (N. Y.) 242;

People v Sup'rs, 12 Wend. (N. Y.) 257;

Gillmore v Lewis, 12 Ohio 281;

Bussier v Pray, 7 Serg. & R. (Pa.) 447.

But for services, without the line of his official duty, an officer may have additional compensation.

See *post*, §§ 486-488, 490-495;

Also, *County Com'rs v Brewer*, 9 Kan. 307;

Huffman v County Com'rs, 23 Kan. 281;

Detroit v Redfield, 19 Mich. 376;

Contra, see *post*, § 483,

A custom, fifty years old, to allow county commissioners an additional compensation "for incidental expenses," beyond the *per diem* allowance fixed by statute, is inadmissible. *Albright v Bedford Co.*, 106 Pa. St. 582.

See, however, *Boyden v Brookline*, 8 Vt. 284.

imposed upon the district attorney of the county of New York, the very onerous additional duty of prosecuting recognizances, and suing for the money of fines upon defaulting jurors; it was held, that for so doing he could have no compensation, in addition to his salary. The court said: "By charging the attorney with the duty of suing for fines, without making provision for the payment of costs, the legislature has, in effect declared, that the salary of the officer is to be deemed the compensation for these, as well as for other services. It is impossible for a salary officer to make title to an increased compensation, on the sole ground that a new duty has been cast upon him by the legislature. . . . Whether the pay shall be increased with the burden, is a question which addresses itself to the legislature. The courts have nothing to do with it." ¹ So where the mayor of a city had received, in the course of the discharge of his official duties, injuries, from which he afterwards died; and the common council passed a resolution, to allow him \$10,000 in addition to his salary, in consideration of the expenses of his illness, and as a testimony of their high appreciation of the manner in which he had discharged his duties; it was held that his administrator could not maintain an action for the money. The court said: "The mayor had assumed the performance of certain duties; and the city had paid a certain salary, by way of compensation, equal to their supposed value, and could not be made morally responsible for the accidents which might occur in their performance." Hence the promise, contained in the resolution, was without consideration. ²

§ 480. **Secretary of territory acting as governor; clerk of department as government agent.**—So, where a clerk

¹ *People v Supervisors*, 1 Hill (N. Y.) 362, per Bronson, J., p. 367. ² *Heslep v Sacramento*, 2 Cala. 580.

in the department of the interior was appointed by the secretary of the interior, the agent of the United States to attend the industrial exhibition in London, and his certificate of appointment stated that his compensation for so doing "will be allowed;" and he attended accordingly, holding, during the time of his absence, his clerkship, and drawing his regular salary therefor; it was held that, under a statute of the United States forbidding an officer of the government from receiving extra pay, he could not have any compensation for his services as such agent.¹ So where a statute of the United States provided, that where the office of governor of a territory should be vacant, the secretary of the territory should perform the duties of the governor, and a person appointed the secretary of a territory acted as governor, during a vacancy in that office, it was held that he was entitled only to his fixed salary as secretary.²

§ 481. **Extraordinary services; promise of special compensation.**—It makes no difference in the application of the rule, that the services, for which the compensation was promised, were of an extraordinary character. Thus, where a constable, who had declined to arrest a certain person in a civil action, was induced to undertake the service by the creditor's promise that he should be well paid, and thereupon employed a person to assist him, and the two went to the defendant's house at 3 o'clock in the morning, and watched till daybreak, when they succeeding in arresting him; it was held, by the court of errors of the state of New York, reversing the judgment of the supreme court, that an action would not lie upon the promise. The chancellor, after saying that specific provisions had been made by the legislature

¹ *Stansbury v United States*, 1 Ct. of Cl. (U. S.) 123; *aff'd* 8 Wall. (U. S.) 33.

See also, *Wilson v United States*, 1 Ct. of Cl. (U. S.) 206.

² *United States v Smith*, 1 Bond (U. S.) 68.

See, however, *post*, § 498.

for a constable's fees on the service of a warrant, added: "The framers of these statutory provisions are not chargeable with the absurdity of supposing, that the compensation, provided in the fee bill, would be a full and adequate one for the performance of the service, in each particular case; but, to prevent extortion and oppression on the part of the public officers, and the interminable litigation which must necessarily arise, if the amount of their compensation or the value of their services were dependent upon the circumstances of each case, a fixed allowance has been prescribed by law, which, taking one case with another, was deemed a fair compensation. . . . The cases, in which extra allowances have been made to public officers, are cases where services were performed by them, for which no compensation was prescribed in the fee bill, or where the services were not rendered by them as officers, but in their private characters." Mr. Senator Tracy said: "In the language of honest Justice Wilmot, 2 Burr. 924, I say 'this is a most shameful and scandalous action.' . . . That a public officer, whose fees are prescribed by law, may maintain an action to recover an additional sum, promised him by a party, for doing his official duty, is a monstrous proposition, fraught with every kind of mischief. The pretence that it is for extra services would cover any conceivable corruption or extortion." ¹

§ 482. **Instances where sheriff was not entitled to extra compensation.**—So a sheriff is not entitled to any compensation beyond the statutory fees, and salary, if any, for his personal attentions to his prisoners.² Nor can he charge for the compensation of keeper for a schooner levied upon, such a fee not being allowed by

¹ *Hatch v Mann*, 15 Wend. (N. Y.) 44, rev'g 9 Wend. (N. Y.) 282.

² *Grubb v Louisa County*, 40 Iowa 314; *County Com'rs v Kindt*, 16 Kan. 157.

statute.¹ So, where there was no jail in his county, and he took the convicted prisoners to the jail of another county, as the statute prescribed, it was held, that he could not have any additional compensation therefor, even for his expenses.² A sheriff cannot delegate to another any right to extra compensation, which he can not himself claim.³

§ 483. **Auditor of public park negotiating a loan.**—Where the auditor of a public park, having a fixed salary, was directed by the park commissioners to procure a loan, but no promise of additional compensation therefor was made; it was held that, although the service was extra official, he was not entitled to any additional compensation.⁴

§ 484. **Contract to reward for doing duty; instance of officer of navy, and of a pilot.**—It has been well said, that a contract to reward an officer for doing his duty is void.⁵ This doctrine was extended to an officer of the United States navy, in a case in the court of chancery of New York. A bill for a discovery and accounting was filed, upon an agreement between the complainant, a lieutenant in the navy, and the defendants, owners of a merchant ship, whereby the defendants undertook to pay the complainant a certain proportion of the profits of a voyage; and the complainant undertook that a ship of war, to which he was attached, which was about to proceed

¹ *Townsend v Ross*, 45 N. Y. Super. Ct. 447.

² *County Com'rs v Honn*, 23 Kan. 256. As respects the disallowance of the sheriff's expenses, this case is contrary to those cited in § 495, *post*.

For other cases, ruling that a sheriff cannot charge fees, for a service which he is required by law to perform, beyond the statutory fee, see the note to § 478, *ante*.

³ *O'Connor v O'Connor*, 47 N. Y. Super. Ct. 498.

⁴ *Sidway v South Park Com'rs*, 120 Ill. 496.

Contra, semble, Detroit v Redfield, 19 Mich. 376.

⁵ *Plackett v Gresham*, 3 Salk. 75; *Putnam v Woodbury*, 68 Me. 58; *Carroll v Tyler*, 2 Har. & G. (Md.) 54; *Tilden v Mayor, etc.*, 56 Barb. (N. Y.) 340.

to the same port, should give the merchant ship special protection, etc. The bill was dismissed on the ground that the contract was unlawful, the chancellor saying: "The idea that an officer, employed by the public for the performance of a public trust, and paid by his country for his services, may take additional and private compensation for the discharge of his official duties, is wholly inadmissible. A distinction, between bribes for doing a duty, and bribes for violating a duty, may exist in casuistry; and a bribe, which has produced a violation of duty, may, when viewed in connection with its effect, be more criminal than a bribe not followed by such a result. But the idea now suggested, that bribes for doing a duty are lawful, is a conception which has never yet found a place in any code of law, or in any system of morals."¹ So, where a statute provided for the licensing of pilots, fixed their fees for pilotage, and made it the duty of all pilots to render all aid in their power, under a penalty; and further provided, that where a pilot should have distinguished himself by his activity and readiness to aid a vessel in distress, he should receive from the master extra compensation, to be fixed, if the parties did not agree, by the master and wardens of the port; it was held, that where a special agreement was made between the plaintiffs, pilots of the port of New York, and the master of a vessel in distress, for the payment of a specific sum to the plaintiffs, for bringing her safe into that port, an action could not be maintained upon such an agreement. The court said: "It being made the duty of the pilots to assist the defendants' vessel, it was oppression in them to exact the stipulation in question. It would lead to abuses of the most serious nature, if such contracts, founded upon such considerations, were held to be legal. There are several cases in the books, tend-

¹ *Weaver v Whitney*, Hopk. (N. Y.) 11

ing to show the leaning of courts of justice against the oppressions of persons in public trust, and the illegality of exacting previous reward for doing their duty. The law allows them sufficient compensation for extraordinary exertion, after the service is performed, which shows it was an object with the legislature to prevent undue advantages being taken."¹

II. Cases where an officer is, or is not, entitled to a reward offered for a special service, or to an informer's share of confiscated property.

§ 485. **Where officers having police duties cannot have rewards.**—It is evident, from what has been heretofore said, that where a reward has been offered, by the public authorities or by an individual, for a service which is within the line of the officer's duty, he cannot claim the reward, although he may have performed the service. Thus, a city watchman cannot have a reward, offered by the city, for the detection of an offender.² And where a state detective, who is prohibited by law from receiving any reward, detected an incendiary, for whose detection and conviction a town had offered a reward, and communicated his information to the plaintiff, upon whose advice the criminal confessed his guilt to the plaintiff, and the officer, and was convicted; it was held that the plaintiff could not recover the reward.³ The overseer of a county poor house and asylum, cannot claim a reward, offered by the county authorities, for the capture and return of an insane patient, who has escaped from his asylum, although he was placed there only temporarily, having escaped from another asylum.⁴

¹ Callagan v Hallett, 1 Caines (N. Y.) 104.

² Dunham v Stockbridge, 133 Mass. 233.

As to the general rule, see also, Davies v Burns, 5 Allen (Mass.) 349.

³ Pool v Boston, 5 Cush. (Mass.) 219.

⁴ Ring v Devlin, 68 Wis. 384.

And a policeman is not entitled to a reward, offered by a citizen, for the detection of a burglar, although he effected the detection, while he was not on duty.' So, a police officer, appointed by a city, but paid by a railroad company, cannot have a reward offered by the company for the arrest of an offender, where the arrest was within the line of his duty.²

§ 486. **Where they and other officers may have rewards.**—The rule that a public officer, whose duty it is to detect or arrest offenders, cannot have a reward, offered by the public or by an individual, for the detection or arrest of a particular offender, has been declared and applied in several other cases. And in one case it has been held, that a deputy sheriff is not entitled to compensation, offered by an individual, for procuring the return from another state of a fugitive from justice from his own state, where the statute fixed the compensation of a state agent employed for such a purpose, and forbade any public officer from receiving any additional compensation for such service.⁴ But, in the absence of such statutory provisions, the contrary ruling has been made elsewhere, on the ground that it was not the officer's duty to go out of the state to arrest a criminal; and this ruling is more in accordance with the principle governing this class of cases, and with the weight of the authorities.⁵ And where the bail of an escaped felon offered a reward for his capture, and safe lodgement in

¹ *In re Russell*, 51 Conn. 577.

² *Thornton v Mo. Pac. Railway Comp'y*, 42 Mo. App. 58.

³ *Ex parte Gore*, 57 Miss. 251;
City Bank v Bangs, 2 Edw. Ch. (N. Y.) 95;
Rea v Smith, 2 Handy (Ohio) 193.
Gillmore v Lewis, 12 Ohio 281;
 See also, *Means v Hendershott*, 24 Iowa 78

Murphy v New Orleans, 11 La. Ann. 323.

⁴ *Day v Townsend*, 70 Iowa 538.

⁵ *Morrell v Quarels*, 35 Ala. 544.
 See also, *Pille v New Orleans*, 19 La. Ann. 274;
Smith v Whildin, 10 Pa. St. 39;
Stamper v Temple, 6 Humph. (Tenn.) 113.

jail; and the sheriff of the county obtained a requisition from the governor, pursued the felon to another state, brought him back, and lodged him in jail; it was held, that he might recover the reward, and that a statute prohibiting a sheriff from taking any compensation, except that allowed by statute, did not affect his right to recover.¹

§ 487. **So for procuring evidence to lead to convictions.**—So, it has been held, that an agreement by private persons to compensate a deputy sheriff, for procuring evidence, which would lead to the conviction of persons implicated in the commission of a crime, where the offence was committed and the trial had in a county, other than that of which the deputy sheriff was an officer, was valid, and that an action could be maintained thereupon. The court said: “The plaintiff had no legal duty to perform, by virtue of his office as deputy sheriff, in procuring the evidence, and causing it to be produced; having no writ to execute, and the offence having been committed and the trial had out of his county, we do not think the policy of the law forbade his receiving the compensation. It was not compensation for the performance of any duty enjoined upon him by law.”² So a city officer, charged with the apprehension of offenders within, but not without, the city, was allowed to recover upon an agreement with an individual, to compensate him for leaving the city, to detect and apprehend a person, who had committed an offence.³

§ 488. **Fireman entitled to reward for entering burning building.**—Where the defendant, while his house was burning, offered \$5,000 to any person who would bring out his wife, dead or alive; and a member of the fire

¹ *Gregg v Pierce*, 53 Barb. (N. Y.) 387; Accord, *Brown v Godfrey*, 33 Vt. 120.

² *Bronnenberg v Coburn*, 110 Ind. 169, at p. 174.

³ *Harris v More*, 70 Cal. 502.

department, on the faith of the offer, but without expressly accepting it, entered the building and brought out her body, at great risk of his own life; it was held that he was entitled to recover. The court, after expressing a doubt, whether it was part of the duty of a fireman to save property or persons from a burning building, said that it was clearly not his duty to do so, at the imminent hazard of his own life.

§ 489. **Rule where officer claims informer's share of confiscated property.**—The same general rule governs, where an officer claims an informer's share of confiscated property. In a case, which arose under the United States internal revenue statute, where the question was, whether certain officers of the United States revenue service were entitled to participate in the informer's share of the proceeds of confiscated property, Lowell, J., said: "If the point were new, it might, perhaps be open to argument that an inspector or other officer owes his whole time to the government, and that there is no consideration for a promise to pay him a further reward for the zealous discharge of his duty. But the treasury department and the courts have acquired in the decision of Judge Ware, in *Hooper v. Fifty-One Casks of Brandy*, Daveis, 370, and it must be taken as settled, that an officer of the revenue may, in some cases, be an informer. And the practice has been similar under the internal revenue laws, and rightly, as the statutes themselves show. Still it is clear, that an officer cannot always be considered an informer, merely because he, as officer, acquires information useful to the government. If this knowledge is acquired in the ordinary discharge of his duty, touching the very subject matter, or under a special retainer to investigate that matter, I cannot hold him entitled to a gratuity. . . . In my view, the cases, where an officer may be an in-

¹ *Reif v Paige*, 55 Wis. 497.

former, are where he incidentally, and not in the direct prosecution or course of his duty, or of any special retainer for that purpose, makes a discovery; as if an inspector, put on board a vessel merely to keep the cargo safely, discovers smuggled goods concealed; or where an officer, sent to inquire into a particular charge, discovers something entirely different, and before unsuspected; or where he is told by some one, as a friend and not as an officer, of facts which his informant, not wishing to be known, refuses to bring forward himself, but tells him for the very purpose of enabling him to give information in his own name. In these cases, an officer may be an informer. I do not at present think of any others.”¹

III. Other cases, where it has been held, that an officer was entitled to compensation for exceeding his official duty.

§ 490. **Rule under U. S. statute forbidding extra compensation.**—Several of the cases upon this subject turned upon a statute of the United States, forbidding officers or employees of the United States, having a fixed compensation, to receive any additional compensation from the government.² The former statutes on the same subject were construed by the supreme court of the United States, as meaning that no compensation for extra services can be allowed to an officer of the government, beyond that fixed by law, “except for the performance of certain duties, required by law to be performed, for which the law grants a certain compensation, and which have no connection with the duties of the office he holds.”³ But for the performance of such

¹ United States v 100 Barrels of Distilled Spirits, 1 Low. Dec. (U. S.) 244.
See also, Fifty Thousand Cigars, 1 Low. Dec. (U. S.) 22;
United States v Chessell, 6 Blatchf.

(U. S.) 421.

² U. S. R. S. § 1765.

³ Converse v United States, 21 How. (U. S.) 463.

duties, he may have an additional compensation.' It has been held by the supreme court of the District of Columbia, that the statute above cited "applies only to cases, where the regular and the extra compensations are given for the discharge of duties or rendition of services, incompatible with each other." The court said: "There is nothing disclosed . . . that intimates that these duties were incompatible with each other, and must be carried on at the expense of the one or the other. There is nothing averred . . . that the separate duties discharged by this person, were derivative, one from the other, a protraction of the other, or correlative with each other; a distorting, for the purposes of payment, of one office into two. It was this evil that congress had in contemplation, and provided against." And accordingly the court allowed a person, who was superintendent or foreman of the work of constructing public buildings, at a fixed salary, commissions upon the disbursement of money, appropriated for the construction of public buildings, pursuant to an appointment as agent for that purpose, by the secretary of war. ²

§ 491. **The same subject.**—So it has been held, that where a salaried public officer of the United States, at the request of the head of the department to which he belongs, performs public duties, other than those pertaining to his office, he is entitled to additional compensation therefor.³ Thus, a salaried chemist in the department of agriculture, rendering services to the government, with his superior's consent, in defence of importers' suits, is entitled to additional compensation.⁴ And a collector of

¹ *United States v Brindle*, 110 U. S. 688.
See *Stansbury v United States*, 8 Wall.
(U. S.) 33, cited *ante*, § 480;
Collier v United States, 22 Ct. of Cl.
(U. S.) 125.

² *United States v Evans*, 4 Mackey (D. C.)
281.

See also, *Evans v Trenton*, 24 N. J. L.
764.

³ *United States v Duval*, Gilpin (U. S.) 356.

⁴ *Collier v United States*, 22 Ct. of Cl.
(U. S.) 125.

customs, performing, under the direction of the department, "extra services outside of his own district," which have "no affinity or connection with the duties of his office," may be allowed compensation therefor.¹

§492. **Various instances where extra compensation was allowed.**—The comptroller of a city, who is appointed the agent of the city to receive bonds of the county, and apply them as directed by statute, is entitled to the same compensation as any other agent, that is, to a quantum meruit.² The rule, that an officer can have no extra compensation, applies only to official services; and if a town agent is an attorney, and acts as such by the direction of the town authorities, the town is liable for his services.³ So a county attorney, who goes beyond the limits of his county, to do business for the county, is entitled to a reasonable compensation for such services, in addition to his salary.⁴ The representative of a town or city, in the state legislature, is under no official obligation to attend to the prosecution of the claims of the town or city for disbursements, nor is the city solicitor; and either is entitled, for such services, to a reasonable extra compensation, if he is employed for that purpose by competent authority.⁵ A police justice of a city, who was employed by the city authorities to revise the city ordinances, may recover a reasonable sum for his services, unless it appears that they were to be rendered gratuitously.⁶

§ 493. **Instances where sheriff and jailor were allowed extra compensation by agreement.**—Although a sheriff is prohibited by statute, from receiving any compensation

¹ *United States v Austin*, 2 Cliff. (U. S.) 325.

² *Detroit v Redfield*, 19 Mich. 376.

³ *Langdon v Castleton*, 30 Vt. 285.
Accord as to the mayor of a city, *Niles v Muzzy*, 33 Mich. 61.

⁴ *County Com'rs v Brewer*, 9 Kan. 333;
Huffman v County Com'rs, 23 Kan. 281.

⁵ *Calais v Whidden*, 64 Me. 249.

⁶ *McBride v Grand Rapids*, 47 Mich. 236; s. c. 49 Mich. 239.

not allowed by law, still an agreement by a judgment debtor, with a sheriff, holding an execution against him, to pay for the services of a keeper, to prevent the debtor's store from being closed, is valid, and will sustain an action.¹ Where a prisoner, who was sick, promised the jailor, if the latter would attend altogether to the prisoner, instead of devoting his spare time to his business as a blacksmith, to pay him therefor twice as much as he could earn by his work, it was held that the contract was valid.²

§ 494. **Allowed where such appears to be intent of statute fixing compensation.**—Although, where a statute prescribes the duties to be performed by an officer, and the mode of fixing his salary, the general rule is, that the salary so fixed is a full compensation for the officer's services, and supersedes all previous statutes, providing for special compensation for any of such services; yet the rule does not apply, where there are special enactments, showing that the legislature intended that the officer should receive compensation, in addition to salary, for particular services, and that such compensation would be payable ultimately from a different source.³

§ 495. **Reimbursement for extraordinary expenses, etc.**—A public officer is entitled to receive from the public authority which he represents, reimbursement for extraordinary expenses, necessarily incurred by him, in the course of, or in consequence of, the discharge of his official duties, and not intended to be covered by the compensation allowed to him, the rule in this respect being the same as in cases of private agency. Thus, the trustees of a village may maintain an action against the village, or their successors, to recover the costs of an action

¹ *Murtagh v Conner*, 15 Hun (N. Y.) 488.
Recognized and explained, *McKeon v*
Horsfall, 88 N. Y. 429.

² *Trundle v Riley*, 17 B. Mon. (Ky.) 396.
³ *O'Gorman v Mayor, etc.*, 67 N. Y. 486.

against them, brought in consequence of an act done in the faithful discharge of their duty.¹ So an Indian agent of the United States is entitled to reimbursement, for the amount paid by him for freight on supplies, in a sudden emergency.² And a city or town may lawfully agree to indemnify, or actually indemnify, its officer against liabilities incurred by him in the discharge in good faith of his official duties;³ as where an officer is sued for a libel, by reason of matters contained in his official report;⁴ or for malicious prosecution, for bringing an action to recover public money.⁵ So a city may lawfully reimburse to its officer his expenses, incurred in an investigation into his official conduct, upon charges which were found to be groundless.⁶ And the mayor of a city is entitled to reimbursement from the city, for money expended by him, in successfully resisting a legal proceeding, brought in the name of the city, to compel him to do an illegal and injurious act.⁷ But where a certain sum is appropriated by the legislature for the travelling expenses of an officer, the comptroller cannot lawfully draw his warrant for any additional sum for that purpose, within the time covered by the appropriation.⁸

¹ *Powell v Newburgh*, 19 Johns. (N. Y.) 284.

² *United States v Stowe*, 19 Fed. Rep. (U. S.) 807.

³ *Minot v West Roxbury*, 112 Mass. 1.
See also, *Nelson v Milford*, 7 Pick. (Mass.) 18;
Bancroft v Lynnfield, 18 Pick. (Mass.) 566;
Babbitt v Savoy, 3 Cush. (Mass.) 530;
Cushing v Stoughton, 6 Cush. (Mass.)

389.

Hadsell v Hancock, 3 Gray (Mass.) 526;

Pike v Middleton, 12 N. H. 278.

Sherman v Carr, 8 R. I. 431.

⁴ *Fuller v Groton*, 11 Gray (Mass.) 340.

⁵ *State v Hammonton*, 38 N. J. L. 430.

⁶ *Lawrence v McAlvin*, 109 Mass. 311.

⁷ *Barnert v Paterson*, 48 N. J. L. 395.

⁸ *Marshall v Dunn*, 69 Cala. 223.

IV. *Whether an officer, discharging the duties of his own office, and also of another office, can have any compensation, in addition to the emoluments attached to the former office.*

§ 496. **Instances where statute forbidding extra compensation does not apply; per diem allowances.**—Some of the cases, involving this question, have already been cited in this chapter.¹ The cases, where the same person may or may not hold two or more offices, were considered in a former chapter.² Where he holds two incompatible offices, he forfeits the compensation attached to the first, from the time of his acceptance of the second, and that without judgment of ouster.³ But where the offices are compatible, he may have the compensation attached to each office.⁴ And the statutory prohibition against the receipt of additional compensation, by an officer or employee of the United States, does not prevent the receipt of such double compensation.⁵ But it has been said, that where the compensation is a *per diem* allowance, the officer cannot have such an allowance for the same day's service, in each of two or more offices held by him.⁶

§ 497. **Incidental offices and appointments without compensation.**—But where the second office is incidental to, and is necessarily held by the same person as the first, and the statute does not provide for any additional compensation, the officer is confined to the compensation

¹ *Ante*, §§ 480, 490-492.

² *Ante*, Ch. 4.

³ *State v Comptroller General*, 9 S. C. 259.

⁴ *State v Harrison*, 116 Ind. 300;
State v Walker, 97 Mo. 162, overruling
State v Holladay, 67 Mo. 64;
Saunders v United States, 21 Ct. of Cl.
 (U. S.) 408; *aff'd*, *United States v*

Saunders, 120 U. S. 126;
Hartson v United States, 21 Ct. of Cl.
 (U. S.) 451;
In re Conrad, 15 Fed. R. (U. S.) 641.
 See also, *Pennie v Reis*, 80 Cal. 266,
aff'd 132 U. S. 464.

⁵ *Id.*; and *Collins v United States*, 15
 Ct. of Cl. (U. S.) 22.

⁶ *County Com'rs v Bromley*, 108 Ind. 158.

attached to the principal office, and cannot have any additional compensation for the discharge of the duties of the subordinate office.¹ Thus, where the sheriff is made by law also the tax collector of the county, and the county board or the county court, being empowered by law so to do, fixes the compensation of the sheriff, he cannot have any additional compensation as collector.² So: where a poundmaster was appointed a special policeman, and was informed at the time that he would receive no pay in the latter capacity; it was held that he could not have compensation for his services in that capacity.³

§ 498. **Secretary of state acting as governor.**—Where a state constitution provides, that on the removal, death, etc., of the governor, the secretary of state shall discharge the duties of the office, this empowers him to discharge the duties, until a new governor enters, although meanwhile his term as secretary of state expires; and he is entitled to the salary of the governor, from the time when he enters upon the duties of that office, until he ceases to discharge them.⁴

¹ *Upton v United States*, 19 Ct. of Cl. (U. S.) 46.

² *Decatur v Vermillion*, 77 Ill. 315.

³ *Broadwell v People*, 76 Ill. 554;
Hughes v People, 82 Ill. 78.

⁴ *Chadwick v Earhart*, 11 Oreg. 389.
But see *ante*, § 480.

CHAPTER XXI

RIGHTS AND REMEDIES OF AN OFFICER, RESPECTING HIS COMPENSATION

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I. Right of an officer to receive his fixed compensation, without deductions.

§ 499. **Reference to cases cited elsewhere.**—Some cases, where this question was involved, have been cited in a former chapter.¹ Cases, where it was held that an officer, wrongfully kept out of his office, was entitled to his full compensation, without any deductions for what he might have earned, or actually did earn, while thus kept out, will be cited in subsequent portions of this chapter.² The principal question, to be considered here, is whether an officer's compensation can lawfully be made subject to deduction, by reason of his failure to discharge the duties of his office.

§ 500. **The general rule.**—The general rule, applicable to this class of cases, is well stated in a case in the common pleas of the city and county of New York, in the following language: "The right of an officer to his fees, emoluments, or salary, is such only as is prescribed by statute; and while he holds the office, such right is in no way impaired by his occasional or protracted absence from his post, or neglect of his duties. Such derelictions find their corrections in the power of removal, impeachment, and punishment, provided by law. The compensations for official services are not fixed upon any mere principle of a quantum meruit, but upon the judgment and consideration of the legislature, as a just medium for the services which the officer may be called upon to perform. These may in some cases be extravagant for the specific services, while in others they may furnish a remuneration which is wholly inadequate. The time and occasion may, from change of circumstances, render the service onerous and oppressive, and the legislature

¹ *Ante*, §§ 456, 469.

² *McVeany v Mayor*, etc., 80 N. Y. 185;

and other cases in divisions II and III of this Chapter.

may also increase the duties to any extent it chooses; yet nothing additional to the statutory reward can be claimed by the officer. He accepts the office 'for better or for worse;' and whether oppressed with constant and overburdening cares, or enabled, from absence of claims upon his services, to devote his time to his own pursuits, his fees, salary, or statutory compensation, constitutes what he can claim therefor, and is yet to be accorded, although he performs no substantial service, or neglects his duties. . . . The fees or salary of office are '*quicquid honorarium*,' and accrue from mere possession of the office." ¹

§ 501. **The same subject; power to deduct for absence.**—This question is generally presented, where the officer is a subordinate, and has been absent from duty for a portion of the time; and an attempt has been made by his superior to deduct a proportionate part of his compensation for the time during which he is so absent. There is no power to make such a deduction, unless it is expressly granted by statute. And the grant of a power to a board of fire commissioners, to impose a penalty, not exceeding \$50, for a breach of the by-laws, does not empower them to sentence a subordinate to forfeit a month's pay, being \$100, for such a breach.² "The incumbent of an office is *prima facie* entitled to the lawful compensation thereof, so long as he holds the office, though he may be disabled by disease or bodily injury from performing its duties. If it be an office held at the will of the appointing power, and that power does not see fit to have the compensation go on, while the incumbent is so disabled, the only remedy, in the absence of express law or regulation authorizing the stoppage of the compensation during the disability, is to remove the

¹ *People v Green*, 5 Daly (N. Y.) 254, per Robinson, J., pp. 263, 269; reversed,

but not on this ground, 58 N. Y. 295.

² *Tyng v Boston*, 133 Mass. 372.

incumbent, and so end his rights to the compensation. This right may be cut off by law or by regulation authorizing it, but not by the act of the appointing power, without the authority of law or regulation.”¹

§ 502. Lieutenant-governor in governor's absence.—

It has also been held that a provision, in the constitution of a state, for the service and payment of the lieutenant-governor as governor, during the governor's “absence from the state,” does not apply to the governor's temporary absence, in discharge of an official duty.²

§ 503. Statute authorizing disciplinary rules for police.—

A statute, authorizing a board of police to provide by rules and regulations for the government of the police department, and the discipline of their subordinates, does not confer the power to make a regulation, that deductions shall be made from the salary of a policeman, while detained from duty, by reason of sickness or injury, caused by the discharge of his official duty. Such provisions, said the court, “relate to instances of misconduct, or omission of duty, to those acts of the officer which may be termed offences, or conduct calculated to impair the efficiency of the force, and therefore deserving of punishment, and not to the involuntary failure of the officer to meet the requirements of the law, by reason of sickness or disability, caused by an unusual effort, or by the performance of duty assigned to him. . . . So long as the relator possesses the office, we think he is entitled to the salary.”³ But if an ordinance provides that a policeman shall forfeit his pay, for the time during which he is absent without leave, except in case of sickness, properly certified to by a physician, he must

¹ *Sleigh v United States*, 9 Ct. of Cl. (U. S.) 369.

See also, *Bryan v Cattell*, 15 Iowa, 538; *Whitney v Mayor, etc.*, 39 N. Y. Super.

Ct. 106.

² *State v Walker*, 78 Mo. 139.

³ *People v French*, 91 N. Y. 265, rev'g 24 Hun (N. Y.) 263.

produce a physician's certificate, in order to avoid such a forfeiture, in case of his absence without leave.¹

§ 504. **Police officer arrested for crime and afterwards acquitted.**—Where a police officer was placed under arrest by his superior officer, and committed to prison, upon a charge of burglary, and remained in prison more than seven months, at the expiration of which time he was tried and acquitted; and on the day of his acquittal he reported for duty, and was afterwards dismissed from the force by the police commissioners; it was held, that he was entitled to recover his salary, for the time during which he was confined in prison. The court said: "There is no doubt of the general rule, that an officer is not entitled to compensation, unless he has rendered the service incidental to his office. But this rule can have no application to a case, where the officer is prevented by the exercise of a superior power, residing within the sovereignty of the state, which unjustly deprives him of his liberty. . . . It cannot be said, with any propriety, that he was absent without leave, which implies and necessarily involves an omission to appear or present himself for duty voluntarily, when he had the opportunity to do otherwise."²

§ 505. **Large discretion in such cases to superior officers.**—Where a statute, or an ordinance passed or a regulation made pursuant to a statute, provides for deductions by the principal officers from the compensation of their subordinates, a large discretionary power is necessarily vested in the principal officers, to determine when and to what extent the subordinate shall be excused, by reason of sickness or other temporary disability; and unless it is clear that such discretion has been abused, the courts will not interfere with its exercise. But where

¹ Wilkes-Barré v Meyers, 113 Pa. St. 395.

² People v Police Com'rs, 27 Hun (N. Y.) 261.

the plaintiff, an officer, subordinate to a board of officers having power to remove their subordinates, and to control the compensation of the latter, was absent for several months, by permission of the board, on account of sickness; and while he was so absent, and in the month of September, the board removed him, by a resolution directing that his removal should take effect on the first of May preceding; it was held, that so much of the resolution, as purported to date back the removal to the preceding May, was void; and that the plaintiff was entitled to recover the salary attached to his office, until the removal in September.¹ Where, in an action to recover a salary, it appeared that the plaintiff was absent upon leave during the latter part of the year 1878, but nevertheless was paid his salary without deduction; and, during the years 1879 and 1880, he was occasionally absent, in consequence of illness, but his name appeared upon the pay rolls for his full salary; that the sum was erased by order of the head of the department, and on the margin of the pay roll a memorandum was made, that he was absent without leave, but no information thereof appeared to have been given to the plaintiff; it was held, that the failure to give him notice was a circumstance, from which the plaintiff might infer that his leave of absence had been continued, and so that a recovery was proper.²

§ 506. **As to members and officers of legislature paid per diem.**—Where the members and officers of the legislature of a state were paid for their services at a specified rate for each day, and during the regular session the legislature adjourned for one month; it was held that they were not entitled to their daily compensation during the recess; although the court said, that if the adjournment had been for a few days only, “for some special

¹ *O'Leary v Board of Education*, 98 N. Y., 1 rev'g 9 *Daly* (N. Y.) 161.

² *Devlin v Mayor, etc.*, 41 Hun. (N. Y.) 281.

purpose," the daily pay would go on.¹ And that a resolution of the senate, requiring the president and secretary to certify to the accounts of its officers, for their *per diem* compensation during the recess, was not a law, within a provision of the constitution that no money shall be drawn from the public treasury, except pursuant to an appropriation made by law.²

§ 507. **Officer cannot have compensation while suspended.**—In England, there is at least one authority for the doctrine, that an officer's right to his salary is not affected by his suspension from office by the crown.³ But a different rule has been established by the American courts. Where an officer has been suspended by the president of the United States, under U. S. R. S., § 1768, the United States courts hold that he is not entitled to his salary, during the period of his suspension.⁴ The state courts have established the same rule, with respect to officers suspended under the constitution or the statutes of the state.⁵ Where an officer was wrongfully suspended without pay, by a board having authority to fix the compensation of its subordinates, it was held, that he was entitled to his compensation during the suspension; but where he had agreed that his pay should cease during his suspension, that constituted a waiver of his right to compensation, and was binding upon him.⁶

§ 508. **The same subject; constructive suspension; injunction.**—Where a judicial controversy arose between a city and the county, as to the right to appoint the

¹ *Moren v Blue*, 47 Ala. 709.

² *Reynolds v Blue*, 47 Ala. 711.

³ *Slingsby's Case*, 3 Swanst. 178, per Lord Chancellor Nottingham, cited *ante*, § 401.

⁴ *Barbour v United States*, 17 Ct. of Cl. (U. S.) 149.

Accord, where another was appointed

in his place, *Howard v United States*, 22 Ct. of Cl. (U. S.) 305;

McAllister v United States, 22 Ct. of Cl. (U. S.) 318.

⁵ *Westberg v Kansas City*, 64 Mo. 493. See also, *Shannon v Portsmouth*, 54 N. H. 183.

⁶ *Emmitt v Mayor, etc.*, 38 N. Y. St. Rep'r 907; to appear in 128 N. Y.

resident physician of an insane asylum, and an agreement was made between the contending parties, that the plaintiff, who was in office under the city, should remain in the building, without acting, and the person appointed by the county authorities should act, and the mayor accordingly directed the plaintiff not to act; and the agreement was carried out, and the person appointed by the county acted, and received the salary from the county, until the determination of the controversy in favor of the city; it was held, that the plaintiff had been, in fact, suspended by the mayor, who had the power to suspend a city officer, and so was not entitled to any salary, between the time of the agreement and the decision of the controversy.¹ A police officer, suspended by the mayor of a city, is not entitled to his pay, during the suspension, although the cause of the suspension was afterwards declared to be insufficient.² But where an officer has been prevented from exercising his official duties by an injunction, his salary does not cease, during the time while the injunction is in force.³

II. Remedies of an officer against the public authorities for his compensation.

§ 509. **Remedies against the government and its officers.**—An officer is entitled to compel payment of his salary, by a mandamus against the disbursing officer of the government, who, without legal excuse, refuses to pay him; but not where an appropriation therefor has not been made, or a lawful warrant therefor has not been issued;⁴ or where there is a dispute respecting his title, and he is not in possession.⁵ The rules of law, relating to a mandamus, will be fully considered in a subsequent chapter.⁶ There can be no remedy for an officer's com-

¹ Howard v St. Louis, 88 Mo. 656.

⁴ Post, § 824.

² Steubenville v Culp, 38 Ohio St. 18.

⁵ Post, §§ 825-827.

³ Savage v Pickard, 14 Lea (Tenn.) 46.

⁶ Chapter 31, division III.

pensation, except by mandamus, against an officer of the state or national government, and of course no remedy whatever against the government itself. But an officer may maintain an action for his compensation against the county, city, village, or town, liable to pay it, or against a board or officer of the municipal government charged with the duty of paying it, or made liable therefor by statute.¹ This right is subject to certain rules and limitations, which we will now proceed to consider.

§ 510. **Requisites of action for compensation against municipality.**—An officer of a city, wrongfully removed or discharged before the end of his term, cannot maintain an action for his salary against the city, for the time subsequent to his removal or discharge; but he must first proceed by mandamus, certiorari, or otherwise, to procure himself to be reinstated.² And where the municipal authorities have fixed the salary of an officer at a smaller sum than that which the law allows, he cannot maintain an action against the city for the larger sum, or the difference between the two sums; he must first procure the correction of the error by mandamus.³ An officer who has abandoned his office, cannot maintain an action for his compensation.⁴ In order to maintain such an action, the plaintiff must be an officer *de jure*; for one who is an officer *de facto* only cannot recover.⁵ Where he is such an officer *de jure*, and has an unqualified right to receive his lawful compensation, he can, in general, recover the

¹ Ex. gr. the board of education, in the case cited in § 505, *ante*. So, by statute, many local officers are made liable to actions, to recover demands against the public body which they represent.

² *Riley v Kansas City*, 31 Mo. App. 439; *Wood v Mayor, etc.*, 55 N. Y. Super. Ct. 230;

Hagan v Brooklyn, 126 N. Y. 643.

³ *Dolan v Brooklyn*, 55 Hun (N. Y.) 448.

⁴ *Phillips v Boston*, 150 Mass. 491, cited *ante*, § 422; *Dickerson v Butler City*, 27 Mo. App. 9.

⁵ *Matthews v Supervisors*, 53 Miss. 715; *Darby v Wilmington*, 76 N. C. 183, and cases cited *post*, § 517, and in ch. 27.

same by an action.¹ Some exceptions, however, to this principle may be found; as where the sheriff of a county brought an action against the county, on the ground that the statute, under which his account had been settled, had been adjudged to be unconstitutional, and he was therefore entitled to a more favorable fee bill under a former statute. There the court held that he could not recover, because the former statute created a special tribunal, namely, the county auditors, for the settlement of county officers' accounts.² But the plaintiff in such an action cannot recover for a period, during which no services were rendered by him, without establishing that his appointment was of such a character, or for such a time, that he is entitled to his compensation, whether the services appertaining thereto were or were not performed by him.³

§ 511. **The same subject; rule as to possession.**—And it has been held, in several cases, that such an action does not lie, where the plaintiff has not obtained possession of the office; and in some cases, even after he has obtained possession, for the time during which he was out of possession.⁴ A case, decided by the court of appeals of the state of New York, presented these features. There had been contesting claimants for the office of street commissioner of the city of New York; and after it had been adjudicated that D was entitled to the office, an action was brought against the city by a deputy collector under D, to recover the commissions on assessments allowed by law to the deputy collector. The plaintiff had not served, because the city authorities had recognized one of the

¹ *People v Mayor, etc.*, 25 Wend. (N. Y.) 680;

Devoy v Mayor, etc., 39 Barb. (N. Y.) 169;

Canniff v Mayor, etc., 4 E. D. Smith (N. Y.) 430;

Dillon Mun. Corp., 4th ed., § 235 (*174).

See also *Kip v Buffalo*, 123 N. Y. 152,

cited *ante*, § 96, and numerous other cases cited in this chapter.

² *Schuykill Co. v Boyer*, 125 Pa. St. 226.

³ *Brandt v Mayor, etc.*, 48 N. Y. Super. Ct. 298.

⁴ *Ante*, § 473.

other contestants; and the assessments had been collected by a deputy collector under the latter. The court of appeals held that the plaintiff could not recover. Hunt, Ch. J., delivering the opinion of the court, after saying that an office is not property in this country, nor are the prospective fees of an office the property of the incumbent; that the legislature, or, if the office is municipal, the municipal authorities, may diminish or abolish the compensation, in the absence of any constitutional restrictions; and that consequently the plaintiff had no contract with the city; added: "If a corporation employ or appoint an officer to perform certain duties, at a compensation agreed, the services being performed, the corporation is liable to an action for the compensation. The action before us goes upon the ground of a contract to give the office to the plaintiff, or to permit him to perform its duties; and that, not having given it to him, or not having allowed him to perform its duties and receive its fees, the defendant is liable for this breach of contract. There is no analogy or similarity in the cases." ¹

§ 512. **As to recovery of fees or commissions.**—And even where an officer, kept out of possession, is entitled to recover his salary, some of the authorities hold that where his compensation is either by commissions, as in the last case cited, or by fees, payable by the municipality, he cannot recover such compensation, on the ground that fees or commissions are merely incident to services actually rendered, not to the right to the office. ²

¹ *Smith v Mayor, etc.*, 37 N. Y. 518, aff'g 1 Daly (N. Y.) 219.

Approved and followed, *Auditors v Benoit*, 20 Mich. 176;

Westberg v Kansas City, 64 Mo. 493.

See also, *Butler v Pennsylvania*, 10 How. (U. S.) 402. per Daniel J., pp. 415, 416.

citing *County Com'rs v Anderson*, 20 Kan. 298;

Auditors v Benoit, 20 Mich. 176;

Hadley v Mayor, etc., 33 N. Y. 603, per Denio, J., p. 607;

Smith v Mayor, etc., 37 N. Y. 518;

Dolan v Mayor, etc., 68 N. Y. 274.

See also, *Hoboken v Gear*, 27 N. J. L. 265.

² *Dillon Mun. Corp.*, 4th Ed., § 235 (*174)

§ 513. **Rule as established in New York.**—The correct rule upon this subject, and also in the case where the municipality has paid the compensation attached to the office, to a person who had wrongfully obtained possession of it, is stated in a case in the New York court of appeals, decided in the year 1880. There an action was brought against the city of New York, to recover the salary for the year 1869, attached by law to the office of assistant alderman of the city. It appeared that at the election held in 1868, the plaintiff and one C were candidates for that office, and the certificate of election was given to C. By the charter, the board of assistant aldermen had the power to judge of the election and qualification of its members. The plaintiff presented to the board a claim to the seat, but the board decided that C was entitled to the seat; and the latter accordingly took the oath of office, and served as assistant alderman during the year 1869. Thereupon an action in the nature of a quo warranto was brought against C, upon the plaintiffs' relation; and in that action it was adjudged, in June, 1869, that the plaintiff was entitled to the office, and that C be ousted therefrom. The plaintiff then gave notice to the fiscal officers, and appeared again before the board of aldermen, and claimed the seat; but the board, claiming the exclusive right to decide as to the right of the seat, refused him admission, and C continued to serve and draw the salary during the remainder of the year. The court held, that the provision of the charter was cumulative only; that the judgment on the quo warranto established, for the purposes of this case, that the plaintiff was *de jure* the assistant alderman for the year 1869; that C was *de facto* in the office under color of title; that if the fiscal officer of the city had paid C the entire salary, in ignorance of the plaintiff's better title, and while C had color of title, the action could not be maintained; that as to the sum paid before the judgment on the quo warranto,

the plaintiff could not recover; but that after that judgment, the payment by the fiscal officer to C was made "of his own will, not in ignorance, not free from duty to obey the judgment, but with knowledge. He knowingly paid to a pretender. He was not, nor was the city, any longer protected in the payment to C, and were bound to retain the arrears of salary, as they accrued due and payable for the rightful officer, if there was a rendition of the services required of the officer by law;" that the services were in fact rendered by C, but in the behoof of the plaintiff, who was entitled to the salary thereafter accruing and unpaid therefor, and was entitled to recover the same. The court also said, that there was no difference in the application of the rule, where the compensation of the officer consisted of fees or commissions, payable by the municipality out of the moneys collected by the officer; for then "the difference would be only that" the compensation "by salary was a fixed and certain sum, and that by fees uncertain;" but where it was by "a specific fee, payable to the officer for each particular official act done, or service rendered for any private person, there could be no basis for an action against the corporate body, for it could not be said that the service was rendered for it, or that it received the money from the private person for the use of the officer *de jure*."¹

§ 514. **The same subject; damages for wrongful removal.**—In a subsequent case in the same court, the plaintiff had been unlawfully removed from his office in the fire department, by the board of fire commissioners, and another person appointed in his place; and upon his application to the supreme court, the proceedings for his removal had been reversed, and he had been restored to

¹ *McVeany v Mayor, etc.*, 80 N. Y. 185, rev'g 1 Hun (N. Y.) 35, and explaining and distinguishing *Conner v Mayor, etc.*, 5 N. Y. 285;

Smith v Mayor, etc., 37 N. Y. 518; and other cases decided elsewhere. See also, *Monroe v Mayor, etc.*, 28 Hun (N. Y.) 258, and *post*, §§ 661, *et seq.*

his office. The court held that the doctrine, laid down in the case last cited, applied where the plaintiff had been thus removed, and his place filled by one to whom the salary of the office had been paid, during the interval between the removal and the restoration of the plaintiff; and that the plaintiff could not recover against the city, either the salary for the time while he was kept out of office, or damages for his wrongful removal; the latter ruling being placed upon the ground that the fire commissioners were public officers, and not the agents of the city.¹

§ 515. **The same subject.**—But the rule is different, if it does not appear that another person has been specifically appointed, to fill the place of the officer wrongfully removed. Thus, where a policeman of Brooklyn, entitled by law to a fixed salary, was unlawfully removed by the police commissioners, and, upon a certiorari, the order of removal was reversed, and he was restored to his place; whereupon he brought an action against the city to recover his salary, for the time intervening between his removal and his restoration; it was held, that he was entitled to recover the full amount of his lawful salary, and that the city was not entitled to any deduction, by reason of wages, which it was proved that he had earned in another capacity, during the same time. Finch, J., delivering the opinion of the court, after saying that the rule of damages, contended for in behalf of the city, which would take the earnings of the plaintiff into account, was that applicable to master and servant and to landlord and tenant, continued: “But this rule of damages has no application to the case of an officer suing for his salary, and for the obvious reason that there is no broken contract, or damages for its breach, where there is no contract. We have often held that there is no contract

¹ *Terhune v Mayor, etc.*, 88 N. Y. 247.

between the officer and the state or municipality, by force of which the salary is payable. That belongs to him, as an incident of his office, and so long as he holds it; and, when improperly withheld, he may sue for and recover it. When he does so, he is entitled to its full amount, not by force of any contract, but because the law attaches it to the office; and there is no question of breach of contract or resultant damages, out of which the doctrine invoked has grown.”¹

§ 516. **Rulings elsewhere on these questions.**—The rules thus declared by the court of last resort in New York have been recognized, in their essential features, by decisions in several other jurisdictions.² But in some cases a different rule has been declared. Thus it has been held, that inasmuch as the salary is but an incident to the title to the office, the right thereto of the person having the rightful title is not affected by the fact, that the usurper has discharged the duties of the office, and received the salary; but that he may nevertheless recover the salary, for the time during which he was kept out of the office.³ And the supreme judicial court of Maine has ruled, that a city marshal *de jure*, after a decision in his favor, may recover his salary, in an action against the city, although it was paid by the city to one

¹ *Fitzsimmons v Brooklyn*, 102 N. Y. 536.

² *Dillon Mun. Corp.*, 4th ed., § 235 (*174) citing *Shaw v Mayor*, etc., 19 Ga. 468; s. c. 16 Ga. 172; 21 Ga. 280; s. c. as *Mayor*, etc., *v Hays*, 25 Ga. 590.

See also, *Gorman v Co. Com'rs*, 1 Idaho 655;

Wheatly v Covington, 11 Bush (Ky.) 18; *County Com'rs v Anderson*, 20 Kan. 298;

Stadler v Detroit, 13 Mich. 346;

Auditors v Benoit, 20 Mich. 176;

Comstock v Grand Rapids, 40 Mich. 397;

McAffee v Russell, 29 Miss. 84;

Hannon v Grizzard, 96 N. C. 293.

³ *People v Smyth*, 28 Cala. 21;

People v Oulton, 28 Cala. 44;

Carroll v Siebenthaler, 37 Cala. 193;

People v Potter, 63 Cala. 127;

Meagher v Storey Co., 5 Neva. 244;

Memphis v Woodward, 12 Heisk. (Tenn.) 499. It is to be noted, however, that in California there is a statutory provision that no warrant shall be drawn for the salary of an office, pending a contest therefor.

who was the marshal *de facto*, the payment having been made with notice of the contest. In this case it was also held, that the city is not entitled to any deduction for money earned by the plaintiff, during the same period, from other sources.¹

§ 517. **Where municipality may defend action by officer *de facto*.**—Although, under the rule laid down by the courts in New York, a voluntary payment by the municipality of the salary of one who is merely an officer *de facto*, protects the municipality, yet if it refuses to pay the salary, he cannot recover it by action. As was said, in one of the cases, establishing the former rule, “the right to the salary and emoluments of a public office attaches to the true, and not to the mere colorable title; and, in an action brought by a person claiming to be a public officer, for the fees and compensation given by law, his title to the office is in issue, and if that is defective, and another has the real right, although not in possession, the plaintiff cannot recover. Actual incumbency, merely, gives no right to the salary or compensation.”² So, where a person claiming to be rightfully entitled to a municipal office, on the ground that he held over upon the failure of the appointing power to appoint his successor, applied for a mandamus, to compel the mayor to countersign a warrant of the city comptroller for his salary; and it appeared that the applicant’s right to hold over was questionable; the court denied the application, saying: “The salary and fees are incident to the title, and not to the usurpation and colorable

¹ *Andrews v Portland*, 79 Me. 484.

² *Dolan v Mayor, etc.*, 68 N. Y. 274, at p. 279.

See also, *McCue v Wapello Co.*, 56 Iowa 698;

Matthews v Supervisors, 53 Miss. 715;

People v Hopson, 1 Denio (N. Y.) 574;

People v Nostrand, 46 N. Y. 375:

Mayor, etc., v Flagg, 6 Abb. Pr. (N. Y.) 296;

Darby v Wilmington, 76 N. C. 133;

Riddle v Bedford Co., 7 Serg. & R. (Pa.) 386.

possession of an office. . . . It does not follow" (because the acts of an officer *de facto* are valid) "that a right can be asserted and enforced, on behalf of one who acts merely under color of office, as if he were an officer *de jure*. When an individual claims by action an office, or the incidents to the office, he can only recover upon proof of title. Possession under color of right may well serve as a shield for defence; but cannot, as against the public, be converted into a weapon of attack, to secure the fruits of the usurpation and the incidents of the office." ¹

§ 518. **The same subject; where office is obtained by force or fraud.**—So it was held, that a suit for the compensation attached to an office puts in issue the title to the office, and the plaintiff cannot recover, if he was constitutionally ineligible, although he was apparently rightfully elected, and has served without ouster; in such a case, his services are regarded as those of a volunteer.² And that one, who obtained his office by force and without authority, cannot recover the compensation attached thereto.³ Nor can an officer, chosen under an unconstitutional statute, recover his compensation.⁴ And a person, who merely claims to be a rightful officer, cannot recover the salary of an office, until his title to the office has been judicially determined; and, in advance of such a determination, the court cannot render a judgment for the salary, without passing upon the title.⁵

§ 519. **Instance where city cannot defeat action.**—A city having a treasurer duly appointed, and who is allowed by law a commission upon the money of the city disbursed by him, cannot defeat the treasurer's right

¹ *People v Tieman*, 30 Barb. (N. Y.) 193; 8 Abb. Pr. (N. Y.) 359.

² *Meehan v Hudson County*, 46 N. J. L. 276.

³ *Matthews v Sup'rs*, 53 Miss. 715.

⁴ *Darby v Wilmington*, 76 N. C. 133.

⁵ *Baxter v Brooks*, 29 Ark. 173.

to his commissions, by placing the money in the hands of the mayor for disbursement.¹

§ 520. **Gross appropriation for specified services.**—Where, by statute, a sum of money was appropriated for certain services, to be performed by the secretary of state, and part of such services were performed by the secretary then in office, and the remainder by his successor, but the former received the entire appropriation; it was held, that the latter could not maintain an action against the former, for a proportionate part of the money; that his remedy was against the state; and that the state could compel the former incumbent to refund the excess.²

III. *Remedies of an officer against an intruder for his compensation.*

§ 521. **Fees pending contest.**—Where the title to an office is contested, the fees appurtenant thereto, and payable by individuals, and, subject to the qualification stated in the last preceding division,³ the salary, fees, or commissions, payable by the public authorities, belong to the person in possession of the office, pending the contest; and, in an action therefor, the plaintiff's title to the office is not in issue.⁴ But where the plaintiff, after holding the office for five months, surrendered it to the contestant, and no further proceedings were taken to determine the title, it was held, that the plaintiff's *prima facie* title was destroyed by the contestant's *prima facie* title, so that the plaintiff could not recover for the five months during which he held the office.⁵

¹ *Beard v Decatur*, 64 Tex. 7.

² *Trumbull v Campbell*, 8 Ill. 502.

³ *Ante*, § 517.

⁴ *Hunter v Chandler*, 45 Mo. 452;
State v Draper, 48 Mo. 213;

State v Clark, 52 Mo. 508;

State v John, 81 Mo. 13;

Luzerne County v Trimmer, 95 Pa. St.
97.

⁵ *Dickerson v Butler City*, 27 Mo. App. 9.

§ 522. **Action by officer de jure against intruder for salary.**—But, after judgment of ouster against the intruder, and of restoration in favor of the person rightfully entitled to the office, the latter may recover from the former, by action, the compensation received by the latter while he held the office. For, as it was said in a case in the supreme court of Michigan, an official salary belongs to the office itself, without regard to the amount of work done by the officer; and where a person has obtained judgment of ouster against one having the certificate of the returning board, he is entitled to the salary from the beginning of the term, although he did not qualify until after the judgment, and without deduction for the services of the defendant, or for what the plaintiff might have earned while he was kept out.¹ But where the incumbent of an office was ousted upon quo warranto, and appealed; and, pending the appeal, the claimant resigned, and another person was appointed to fill the vacancy; and the judgment of ouster was reversed upon appeal, and the original incumbent restored; it was held, that the latter could not recover from the person appointed to fill the vacancy the fees received by him, while he was in possession, because the plaintiff had made no demand upon him to surrender the office, or any attempt to perform its duties.* Where the plaintiff was unlawfully removed by the mayor of New York from the office of police commissioner, and the defendant was appointed by the mayor for the unexpired term, and was recognized by the other members of the board, and assumed the duties of the office, and drew the salary; but, upon a certiorari, sued out by the plaintiff against the mayor, the proceedings of the mayor were reversed and annulled; whereupon the plaintiff was recognized by the board, and

¹ *People v Miller*, 24 Mich. 458.
Accord, *Farwell v Adams*, 112 Ill. 57;
People v Nolan, 101 N. Y. 539.

But see, *Mayfield v Moore*, 53 Ill. 428.
² *Nichols v Branham*, 84 Va. 923.

resumed the duties of the office; it was held that an action for the salary received by the defendant lay in favor of the plaintiff, and that the record on the certiorari was evidence in the action; but whether it was conclusive or not, or whether it *ipso facto* worked a reinstatement of the plaintiff, the court did not decide.¹ The right of the officer *de jure* to recover the salary of the office received by the officer *de facto*, as stated in the foregoing cases, has been recognized and applied in several other adjudications.² And, after judgment upon quo warranto, he may have the same remedy by an action upon the bond for a *supersedeas*.³ The right of the person who has been reinstated, to recover from the usurper the emoluments of the office, is not affected by the fact that the latter was put into possession by a judgment, which was afterwards reversed, as the doctrine protecting rights acquired under a judgment, notwithstanding the reversal thereof, is not applicable to this case.⁴

§ 523. **Recovery of fees received by intruder.**—The rule is the same, with perhaps a slight qualification, as to the fees of the office received by the intruder. It was said in a case in the supreme court of Illinois, that the legal right to an office confers upon the person having such right, the right to receive the fees and other emoluments legally incident to the office. And if a person, without legal right, assumes to perform the duties of the office, and receives accordingly the fees and emoluments thereof,

¹ *Nichols v MacLean*, 101 N. Y. 526, aff'g 63 How. Pr. (N. Y.) 448; 19 Week. Dig. (N. Y.) 96.

² *Mayfield v Moore*, 53 Ill. 423.
Glascok v Lyons, 20 Ind. 1;
Rule v Tait, 38 Kan. 765;
Comstock v Grand Rapids, 40 Mich. 397;
Hunter v Chandler, 45 Mo. 452;
Dolan v Mayor, etc., 68 N. Y. 274;
Currey v Wright, 9 Lea (Tenn.) 247.

Allen v McKeen, 1 Sumn. (U. S.) 276;
Bier v Gorrell, 30 W. Va. 95.
 See also, *Howard v Wood*, 2 Lev. 245;
Green v Hewett, Peake N. P. 182;
Boyter v Dodsworth, 6 T. R. (D. & E.) 681; 1 Selw. N. P. 81;
Lawlor v Alton, 8 Ir. R. Com. L. 160.

³ *United States v Addison*, 6 Wall. (U. S.) 291.

⁴ *Kessel v Zeiser*, 102 N. Y. 114.

he is liable to the person having the legal right for the money so received by him; but, where he acted in good faith and under the apparent right, he may be allowed the reasonable expenses of earning the fees.¹ The same ruling, without reference to the right to deduct the expenses, has been made in other cases.² But in one case, it was ruled that the rightful officer cannot recover the fees of the office, although after ouster, against the officer *de facto* who has received them in good faith.³

¹ *Mayfield v Moore*, 53 Ill. 428.
Accord, *Bier v Gorrell*, 30 W. Va. 95.

² *Stoddard v Williams*, 65 Cal. 472;
Sigur v Crenshaw, 10 La. Ann. 297;
Petit v Rousseau, 15 La. Ann. 239.

³ *Stuhr v Curran*, 44 N. J. L. 181.

Explained, *Meehan v Hudson Co.*, 46 N. J. L. 276.

The decision is placed upon the ground that the salary is given as a compensation for services; and it is said, that the cases holding the other way depended upon statutory provisions. See 44 N. J. L. 188-191.

CHAPTER XXII

EXTORTION

CONTENTS

SEC. 524. Extortion defined.

- 525. Punishable criminally by statute, here and in England; but it is a common law offence. Not, however, where money paid voluntarily or according to usage.
- 526. Attorney guilty where he receives unlawful fees; justice of the peace may take fees for warrant in advance; officer receiving money in good faith to settle with complainant not guilty; revenue officer guilty for receiving money to procure discharge.
- 527. Corrupt motive essential to offence, or to liability for statutory penalty; aliter in Nebraska; officer liable to penalty, whether he takes excessive fee, or a fee where none is provided; but not where he is not entitled to any fees.
- 528. Officer liable, though excessive fee taxed and collected by party; cannot defend because he omitted to charge other lawful fees, or tendered restitution.
- 529. Rulings as to liability of clerk to county for excessive charges.
- 530. Independently of statute, unlawful charge may be recovered back, although paid without protest, etc.

§ 524. “**Extortion**” defined.—“Extortion, in a large sense, signifies any oppression under colour of right; but in a more strict sense, signifies the unlawful taking by any officer, by colour of his office, of any money or thing of value that is not due to him, or more than is due, or before it is due. . . . And generally, no public officer may take any other fees or rewards for doing anything relating to his office, than some statute in force gives.

him, or such as have been anciently and accustomably taken; and if he do otherwise, he is guilty of extortion.”¹

§ 525. **The statutes and the common law.**—In England, extortion was first made a statutory offence, by the statute of Westminster, 3 Edw. I., ch. 26, which defined it to be “to take any reward whatever, except what he received from the king.”² And in this country it is made punishable by statute, in every state of the union. But the statute of Westminster was only in affirmance of the common law.³ “As to extortion by officers, it is so odious (being more heinous, as my Lord Coke says, than robbery, as it is usually attended with the aggravating sin of perjury), that it is punishable at common law by fine and imprisonment, and also by a removal from the office in the execution whereof it was committed.”⁴ So the statute W. I., ch. 10, forbidding coroners to take fees for doing their office, was in affirmance of the common law, and a coroner taking fees shall be fined; but a coroner may take the customary payment from each town that comes to the eyre, for that is a payment due in respect of his office, and not for doing his office.⁵ “Also, it seems that an officer who takes a reward, which is voluntarily given to him, and which has been usual in certain cases, for the more diligent or expeditious performance of his duty, cannot be said to be guilty of extortion; for without such a *praemium* it would be impossible, in many cases, to have the laws executed with vigor and success.”⁶

¹ 1 Russell on Crimes, 5th Eng. ed., 303, 304; 5th Amer. ed., 142.

See also, Hawkins P. C., Book I, ch. 68;

Bac. Abr., tit. Offices and Officers, N;

Shattuck v Woods, 1 Pick. (Mass.) 171;

Comm. v Bagley, 7 Pick. (Mass.) 279;

State v Pritchard, 107 N. C. 921;

Williams v State, 2 Sneed (Tenn.) 160.

² 1 Russell on Crimes, *ubi supra*.

³ Id.; Hawkins P. C., *ubi supra*.

⁴ Bac. Abr., tit. Offices and Officers, N; Hawkins P. C., *ubi supra*.

⁵ Com. Dig., tit. Officers, G., 15 a, citing 2 Inst., 176.

⁶ Bac. Abr., tit. Offices and Officers, N.

§ 526. **Cases relating to particular officers.**—"An attorney must be regarded as receiving his fees officially, as much so as a sheriff or any other officer; and if so, then the act of an attorney, in receiving illegal fees, is one of official misconduct."¹ Under the New Jersey statute, it has been held that a justice of the peace is not guilty of extortion for demanding his fee, before issuing a warrant in a criminal cause.² It is not extortion, where an officer, holding a process for assault and battery, receives money from the defendant, not for his own use, but to be used in good faith in settling the prosecution.³ But U. S. R. S. § 3169, punishing extortion by revenue officers under color of law, applies to such an officer, who takes a reward from a person arrested for a breach of the revenue laws, upon a promise to procure his discharge.⁴

§ 527. **Whether corrupt intent requisite to constitute extortion.**—Upon the trial of an indictment for extortion, the motives of the officer, as whether they were corrupt, or whether he acted in ignorance of the law, are a proper question for the jury.⁵ And an officer, who takes a fee not authorized by law, under the belief that he is entitled to it by law, and without corrupt intent, is not guilty of extortion.⁶ So, in an action to recover a penalty, imposed by statute for extortion, the plaintiff cannot recover, unless the jury find that the unlawful compensation was taken knowingly and corruptly.⁷ And an officer who takes a fee, not allowed by law, but which it has been the custom to charge, believing it to be law-

¹ *Waters v Whittemore*, 22 Barb. (N. Y.) 593, per Mason, J.

(U. S.) 595.

⁵ *People v Whaley*, 6 Cow. (N. Y.) 661.

² *Lane v State*, 49 N. J. L. 673, rev'g 47 N. J. L. 362.

⁶ *Leeman v State*, 35 Ark. 438; *Brackenridge v State*, 27 Tex. Ct. App. 513.

³ *White v State*, 56 Ga. 385.

⁴ *United States v Deaver*, 14 Fed. Rep.

⁷ *Triplett v Munter*, 50 Cal. 644.

ful and proper so to do, is not liable to a statutory penalty.¹ But in another case, it was ruled, that a mistake or ignorance of the law was not a defence to an action for a statutory penalty.² An officer, who knowingly and corruptly receives an unlawful fee, is liable to the statutory penalty, whether the fee was received for services, for which a fixed compensation is given by law, or for a service for which the fee bill provides no compensation.³ But it has been held, that where a statute affixes a penalty, for taking "greater or other fees" than as prescribed in the statute, an action for the penalty will not lie against an officer who has no right to any fees.⁴

§ 528. **Excessive fees taxed by party; tendering restitution.**—An officer, charging and receiving from the plaintiff in an action, a greater amount of fees than the law allows, for serving a writ, is liable to the plaintiff for the statutory penalty, although the plaintiff recovered judgment in the action, taxed the fees as charged in the costs, and collected the judgment from the defendant.⁵ In an action to recover the statutory penalty, the defendant cannot set up his omission to charge fees, to which he was lawfully entitled, or a tender of restitution before the action was brought.⁶

§ 529. **Rulings as to liability of county clerk for excessive charges.**—Where a statute provides that a clerk, charging excessive fees, shall forfeit ten times the amount of the excess "to the party injured," the county may recover the penalty, where excessive fees were charged by him to it, and allowed by the board of county commissioners, and their allowance does not bar the action.

¹ Haynes v Hall, 37 Vt. 20.

See also, Wheelock v Sears, 19 Vt. 559.

See also, Ferkel v People, 16 Ill. App. 310.

² Cobbe v Burks, 11 Nebr. 157.

³ Johnson v Burnham, 22 Vt. 639.

⁴ Henry v Tilson, 17 Vt. 479.

⁵ Turner v Blount, 49 Ark. 361.

⁶ Garber v Conner, 98 Pa. St. 551.

But where the clerk is allowed by law, for attendance on the board, a compensation, not exceeding three dollars a day, "to be fixed by the board," the county cannot recover back the amount so fixed, upon the ground that the clerk charged for more days than the board was in session.¹

§ 530. **Independently of statute, unlawful charge may be recovered back.**—Independently of any statute, where a sheriff claims, as of right, a larger fee than he is allowed by law, and the attorney pays it in ignorance of the law, the attorney may maintain against the sheriff an action for the excess.² Or the person injured may be redressed summarily upon motion to the court.³ The American cases fully sustain the doctrine, that money, exacted by and paid to a public officer, under a claim of right, for his official services, may be recovered back, if he was not lawfully entitled thereto.⁴ Such a payment is not regarded as voluntary, and it may be recovered back, although the unlawful charge was paid without protest, or notice of an intention to reclaim the money.⁵

¹ *Richland County v Miller*, 16 S. C. 244.

² *Dew v Parsons*, 2 B. & Ald. 562; 1 Chitt. 295.

See also, *Longdill v Jones*, 1 Stark. 276;

Holmes v Sparks, 12 C. B. 242; 21 L. J., C. P. 194; 15 Jur. 975.

³ *Watson v Edmonds*, 4 Price 309.

⁴ *American Exchange F. Ins. Com'py v Britton*, 8 Bosw. (N. Y.) 148.

Accord,

Shattuck v Woods, 1 Pick. (Mass.) 171;

Ripley v Gelston, 9 Johns. (N. Y.) 201;

Clinton v Strong, 9 Johns. (N. Y.) 370;

Miller v Lockwood, 17 Pa. St. 248;

Smith v Smith, 1 Bailey (S. C.) 70;

Ogden v Maxwell, 3 Blatchf. (U. S.) 319.

⁵ *American Steamship Comp'y v Young*, 89 Pa. St. 186.

BOOK V

POWERS AND DUTIES; AND THE EXERCISE THEREOF

CHAPTER XXIII

NATURE AND EXTENT OF OFFICERS' POWERS AND DUTIES;
WHEN THEY ARE COINCIDENT; GENERAL RULES
RESPECTING THE EXERCISE THEREOF

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537. The same subject.
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IV. Officers' implied and incidental powers.

542. General rule, that officer has all implied powers necessary for performance of his duty; instances of implied powers granted or withheld.

543. Power to contract debts, when not implied; implied power to issue county orders; to loan money in hand.

544. Extent, etc., of implied power to bring suits, and to settle controversies.

545. Public officer cannot be deprived of his powers by implication.

V. When an officer's power and duty are or are not coincident.

546. Generally, this question belongs to the subject of statutory construction.

547. Where officer has power, by statute, to do an act required by public interest, exercise of power is imperative, although permissive words are used; otherwise permissive words give discretionary power.

548. Person, interested in the exercise of a power, has a right to demand its exercise, although permissive words are used.

549. But a mere incidental benefit, without a legal right, does not entitle an individual to such exercise.

550. Other instances of the application of this rule.

VI. Effect of an exercise of power by an officer.

551. A contract by officer empowered, binds the state or a municipality, which is liable like an individual thereupon. Otherwise, where power exceeded. Municipality, etc., liable for officer's acts, in discharging a duty imposed upon it; but not where duty is specifically imposed upon the officer. Rules as to estoppel and ratification.

552. Generally, judicial and *quasi* judicial acts are conclusive; such as allowances of accounts by supervisors, etc.

553. Exercise of discretionary power governed by the same rule; acts of supervisors, etc.

SEC. 554. Excess of power vitiates; cases where allowances of accounts by supervisors, etc., are ministerial acts.

555. Exercise of discretionary power reviewable by courts, in cases of illegality, abuse, injustice, etc.

VII. Power given by statute must be strictly pursued; presumptions in support of regularity of exercise thereof.

556. Statutory power must be strictly pursued, especially where a forfeiture results; person claiming under it must prove such pursuance.

557. Supervisors, etc., acting at special session, where call thereof does not specify the business.

558. Presumption is in favor of correct performance, and every reasonable intendment made accordingly; as that powers were not exceeded; that naught omitted, etc.

559. But presumption will not sustain a vital jurisdictional fact; this must be proved; as where common council's act requires a two-thirds vote.

560. Presumption does not apply to agents, appointed by legislature to sell debtor's land; nor to titles made under tax laws; nor to proceedings of commissioners of highways to lay out roads.

561. Nor to actions against sheriffs, etc., for not paying over money. Officer's certificate, if evidence, must show compliance with the law; no presumption admitted in favor of one officer's acts against another's.

562. Party, invoking jurisdiction of equity, must show affirmatively invalidity of act.

VIII. Miscellaneous rulings respecting officers' powers and duties.

563. Whether power conferred is continuous, or exhausted by one act.

564. Rule as to exercise of *quasi* judicial powers.

565. Policeman presumed to have common law powers of peace officer; so with respect to United States officers.

566. Justice of U. S. supreme court not required to perform patrol duty, under state law.

567. Officer's good faith presumed; and his lawful acts not affected by his motives, or motives of party, or collusion between parties.

568. Officer's lawful acts not affected by intent to act under a void statute; or not to bind the town, etc.

I. Preliminary observations; political powers and duties.

§ 531. **Particular functions to be classified; reference to political powers and duties.**—The scanty, and not very well defined rules for the classification of public officers, according to the general nature of their functions, were considered in a former chapter.¹ In this chapter, we shall consider the rules of classification of the functions themselves; and, as will presently be shown, in many instances an officer, whose general functions are those of one class, exercises also particular functions, belonging to another class. In aid of the solution of questions, arising upon the nature of particular functions, we refer the reader to what was said in the former chapter, respecting the general classification. The loosely defined class of officers, possessing political powers and duties, sometimes styled political officers, and at others executive, administrative, or governmental officers, calls for no special consideration here. The rules of law, concerning the liability of such officers to a private action, and the powers of the courts to control their official conduct, will be considered in subsequent chapters.² But the powers and duties of such officers are essentially either of a ministerial, or of a *quasi* judicial character.

II. Legislative powers and duties.

§ 532. **Defined and distinguished.**—With respect to legislative powers and duties, it has been well said, that “the distinction between a judicial and a legislative act is well defined. The one determines what the law is, and what the rights of parties are, with reference to transactions already had; the other prescribes what the

¹ *Ante*, ch. 3.

² *Post*, ch. 29, 31.

law shall be, in future cases arising under it.”¹ In a literal sense, legislative powers are exercised, in this country, only by the legislatures of the nation and of the different states. The extent and effect of such powers, and the exercise thereof, present questions, which belong to the subject of constitutional law, and are fully considered in various treatises devoted to that subject. But, in a broader sense, legislative powers are exercised by various local officers, such as the council or other legislative body of a city or village, and the officers, having the general control of county affairs, styled, in some of the states, supervisors, in others, county commissioners, in others, chosen freeholders, police jury, etc.² These bodies also perform executive or ministerial duties. Thus, a power conferred upon the mayor of a city to approve or disapprove all proceedings of the common council, which “take effect as an act or law of the corporation,” does not extend an appointment to office, which is an executive, not a legislative act.³ And it has been said, that the powers and duties of supervisors, county commissioners, and similar officers, are sometimes judicial, and sometimes legislative, and executive. They cannot be “reconciled to any particular head; and so those officers are allowed to perform duties enjoined upon them by law, without any nice examination into the character of the powers conferred.”⁴ Questions, arising respecting such powers, belong to the subject of constitutional law, or statutory construction, according to the source from which they are derived.

¹ Sinking Fund Cases, 99 U. S. 700, per Field, J., p. 761.
 Accord, *Mabry v Baxter*, 11 Heisk. (Tenn.) 682.

² *Waugh v Chauncey*, 13 Cal. 11.

³ *Achley's Case*, 4 Abb. Pr. (N. Y.) 35.

⁴ *State v County Com'rs*, 7 Neva. 392.
 Accord, *People v El Dorado County*, 8 Cal. 58.

See also, §§ 23-25, *ante*.

III. *Judicial, quasi judicial, and ministerial powers and duties.*

§ 533. **General scope of “judicial,” “ministerial,” and “quasi judicial” powers.**—The questions arising, respecting the division line between judicial and ministerial powers and duties, are numerous, and often difficult to solve. The derivation of the word “judicial” from “*judex*,” a judge, and that of “ministerial” from “minister,” a servant, would, if strictly adhered to, confine the scope of each expression within very narrow limits: but the signification of each has been largely extended. But where a power rests in judgment or discretion, so that it is of a judicial nature or character, but does not involve the exercise of the functions of a judge, or is conferred upon an officer other than a judicial officer, the expression used is generally “*quasi judicial*.”¹ The importance of a correct designation, in each case, arises from several rules of law, marking broad distinctions between each class of functions; such as the difference in the remedies which may be resorted to, for the purpose of procuring a review by the courts of the exercise of the power, according as the power is deemed judicial or ministerial; the conclusiveness and effect of such exercise; the liability to a private action, of an officer exercising a ministerial power, and the exemption from such an action, of one exercising a judicial power, or a *quasi judicial* power.

§ 534. **Liability for ministerial or judicial acts; definitions.**—The rules, relating to the personal liability of an officer for his official acts, will be fully considered

¹ “*Quasi judicial* functions are those which lie midway between the judicial and the ministerial ones. The lines, separating them from such as are on their two sides, are necessarily indistinct; but in general terms, when the law, in words or by implication, commits to any officer the

duty of looking into facts, and acting upon them, not in a way which it specifically directs, but after a discretion in its nature judicial, the function is termed *quasi judicial*.” Bishop on Non-Contract law, §§ 785, 786.

in a subsequent chapter.¹ At present, for the purpose of illustrating our remarks respecting the importance of the classification under consideration, and as preliminary to our attempt to distinguish the two classes, we reproduce the remarks of a distinguished judge upon those two subjects: "Public officers, of every grade and description, may be impeached or indicted for official misconduct and corruption. To this there is no exception, from the highest to the lowest. But the civil remedy for misconduct in office is more restricted, and depends exclusively upon the nature of the duty which has been violated. Where that is absolute, certain, and imperative, and every mere ministerial duty is so, the delinquent officer is bound to make full redress to every person, who has suffered by such delinquency. Duties, which are purely ministerial in their nature, are sometimes cast upon officers, whose chief functions are judicial. Where this occurs, and the ministerial duty is violated, the officer, although, for most purposes, a judge, is still civilly responsible for such misconduct. But where the duty alleged to have been violated is purely judicial, a different rule prevails; for no action lies, in any case, for misconduct and delinquency, however gross, in the performance of judicial duties. And although the officer may not in strictness be a judge, still, if his powers are discretionary, to be exerted or withheld according to his own view of what is necessary and proper, they are in their nature judicial, and he is exempt from all responsibility by action for the motives which influence him, and the manner in which such duties are performed."² And for these reasons, and upon the authority of this opinion, it was held that the issuing of a habeas corpus by a judicial officer, is a purely ministerial act, inasmuch as the statute vests no

¹ *Post*, ch. 29.

² *Wilson v Mayor, etc.*, 1 Denio (N. Y.) 595, per Beardsley, J., p. 599.

discretionary power in the officer, to whom the application for the writ is made in due form; and consequently that a statute, conferring upon a newly created judge, "all judicial powers" of a judge under the former statutes, did not give him the jurisdiction to issue a writ of habeas corpus, which the latter possessed."¹

§ 535. **Other definitions of judicial and ministerial acts.**—So it was held, that commissioners, appointed by statute to receive subscriptions to the capital stock of a corporation, and to distribute the stock among the subscribers, "in such manner as they shall deem most conducive to the interests of the corporation," act ministerially in receiving subscriptions to the stock; and that act may be performed by an agent, or by any one of them, being afterwards ratified by the board: but the power to distribute the stock is a judicial power, because it involves the exercise of discretion, and the decision is, in its nature, beyond the reach of appeal.² A distinguished chief justice of the United States supreme court said: "A ministerial duty, the performance of which may, in proper cases, be required of the head of a department by judicial process, is one in regard to which nothing is left to discretion. It is a simple definite duty, arising under conditions, admitted or proved to exist, and imposed by law."³ Substantially the same definition has been given by several other judges. Thus it has been said: "Judicial power is authority, vested in some court, officer, or person, to hear and determine, when the rights of persons or property, or the propriety of doing an act, are the subject matter of adjudication. Official action, the result of

¹ *Nash v People*, 36 N. Y. 607, aff'g *In re Nash*, 16 Abb. Pr. (N. Y.) 281; 25 How. Pr. (N. Y.) 307; 5 Park. Cr. (N. Y.) 473.

(N. Y.) 229;
People v Collins, 19 Wend. (N. Y.) 56;
Babcock v Lamb, 1 Cow. (N. Y.) 238;
Ex parte Rogers, 7 Cow. (N. Y.) 526.

² *Crocker v Crane*, 21 Wend. (N. Y.) 211, citing *Walker v Devereaux*, 4 Paige

³ *Mississippi v Johnson*, 4 Wall. (U. S.) 475, per Chase, Ch. J., p. 498.

judgment and discretion, is a judicial act. The duty is ministerial, when the law exacting its discharge prescribes and defines the time, mode, and occasion of its performance, with such certainty, that nothing remains for judgment or discretion. Official action, the result of performing a certain and specific duty, arising from fixed and designated facts, is a ministerial act.”¹ Other cases, wherein the test of the ministerial character of a power is said to be the absence of judgment or discretion in the exercise thereof, are cited in the note.²

§ 536. **The same subject.**—Where a question arose, as to the character and effect of an order of the president of the United States, calling out the militia, in time of war, and of the order of the governor, made pursuant thereto, it was said: “It is a general and sound principle, that whenever the law vests any person with a power to do an act, and constitutes him a judge of the evidence on which the act may be done; and, at the same time, contemplates that the act is to be carried into effect through the instrumentality of agents; the person thus clothed with power is invested with discretion, and is *quoad hoc* a judge. His mandates to his legal agents, on his declaring the event to have happened, will be a protection to those agents; and it is not their duty or business to investigate the facts, thus referred to their superior, and to rejudge his determination.”³ “By judicial action is meant, in legal understanding, that which requires the exercise of judgment or discretion by one or more persons, or by a corporate body, when acting as public officers, in an official

¹ Grider v Tally, 77 Ala. 422, per Clouston, J., pp. 424, 425.

² Morton v Comptroller General, 4 S. C. 430;

Rains v Simpson, 50 Tex. 495;

Kendall v Stokes, 3 How. (U. S.) 87;

South v Maryland, 18 How. (U. S.) 396;

Ex parte Virginia, 100 U. S. 339;

Conner v Long, 104 U. S. 228, at pp. 236 *et seq.*

³ Vanderheyden v Young, 11 Johns. (N. Y.) 150, per Spencer, J., p. 158.

character, as . . . shall seem to them to be equitable and just.”¹

§ 537. **The same subject.**—In the foregoing citations, the definitions of judicial powers or acts relate to those, which, as we have already said, are often styled *quasi* judicial. In a case, where the court was considering strictly judicial powers, and distinguishing them from ministerial powers, it was said: “Judicial acts, within the meaning of the constitution of Indiana, are such as are performed in the exercise of judicial power. But the judicial power of the state is vested in the courts. A judicial act, then, must be an act performed by a court, touching the rights of parties or property, brought before it by voluntary appearance, or by the prior action of ministerial officers, in short, by ministerial acts. . . . The acts done out of court, in bringing parties into court, are, as a general proposition, ministerial acts; those done by the court in session, in adjudicating between parties, or upon the rights of one in court *ex parte*, are judicial acts. And the act is none the less ministerial, because the person performing it may have to satisfy himself, that the state of facts exists, under which it is his right and duty to perform the acts. . . . A ministerial act may perhaps be defined to be one, which a person performs in a given state of facts, in a prescribed manner, in obedience to the mandate of legal authority, without regard to, or the exercise of, his own judgment upon the propriety of the act done.”²

§ 538. **When an act, requiring exercise of judgment or discretion, may still be ministerial.**—The proposition, stated at the conclusion of the foregoing

¹ *People v Sup'rs*, 35 Barb. (N. Y.) 408, per Potter, J., p. 414.

² *Flournoy v Jeffersonville*, 17 Ind. 169. Approved and followed, *Ex parte*

Batesville, etc., R. R. Comp'y, 39 Ark. 82;

Pennington v Streight, 54 Ind. 376. See also, *Evans v Etheridge*, 96 N. C. 42.

extract, that an act is not necessarily taken out of the class styled ministerial, because the officer performing it is required to judge, whether the contingency has occurred, in which he is empowered or bound to act, may be extended, so as to include cases where his duty is plainly pointed out, but he is nevertheless vested with a discretion, respecting the means or the method of performing it. A learned judge, whose remarks in this connection have already been quoted, says forcibly that "such is not the judgment or discretion, which is an essential element of judicial action."¹ This proposition may be illustrated by several cases. Thus an officer authorized, upon certain conditions, to issue or revoke licenses to foreign insurance companies, enabling them to transact business within a state, acts ministerially, not judicially, in issuing or revoking such a license, although he is required, in each case, to ascertain the existence of the facts upon which his authority is founded.² And issuing and delivering a patent to land, after the right thereto is complete, is a ministerial act.³ County officers, in bringing a suit for the benefit of the county, and executing an injunction bond therein, act ministerially, not judicially.⁴ An order by county commissioners to sell county property, is a ministerial act.⁵ The decision of inspectors or judges of election, as to the admission of a vote; or of county canvassers as to the result of an election; and the making of returns by election officers; are all ministerial acts.⁶ The power of a collector of the

¹ *Grider v Tally*, 77 Ala. 422, per Clopton, J., p. 426.

See also, *Crane v Camp*, 12 Conn. 464.

² *State v Doyle*, 40 Wis. 174.

³ *Simmons v Wagner*, 101 U. S. 260.

⁴ *Washington County v Boyd*, 64 Mo. 179.

⁵ *Platter v County Com'rs*, 103 Ind. 360, at p. 373.

⁶ *People v Van Slyck*, 4 Cow. (N. Y.) 297; *Ex parte Heath*, 3 Hill (N. Y.) 42;

Morgan v Quackenbush, 22 Barb. (N. Y.) 72;

People v Pease, 27 N. Y. 45; 25 How. Pr. (N. Y.) 495; aff'g 30 Barb. (N. Y.) 588.

See also, *ante*, §§ 153, 156; *Hudmon v Slaughter*, 70 Ala. 546, and *post*, §§ 746-750.

United States internal revenue to seize and sell property is ministerial; and a sale, in a case not within the statute, confers no title.¹

§ 539. **Judicial officer performing ministerial act.**—A judicial officer may be required by law to perform ministerial acts, and these do not become judicial, because performed by him.² Thus, the admission of a petitioner to take the poor debtor's oath is a ministerial, not a judicial act. "Every selectman, before the appointment of an overseer, and every sheriff, previous to taking bail, makes inquiry to aid him in the legal performance of his duty."³ In executing a writ of inquiry, the officer acts ministerially, not judicially.⁴ The clerk of a court, in granting an order for the seizure of property, in the provisional remedy of claim and delivery, acts ministerially, not judicially; and therefore his deputy may make the order.⁵ A justice of the peace acts ministerially, in appointing freeholders to assess damages for taking land for a highway, although it is necessary that he should pass upon their fitness.⁶ A justice of the peace, in receiving and filing papers and making docket entries, acts ministerially; but the entry of the dates, when the appeal papers were presented, involves the determination of a question of fact, and is therefore *quasi* judicial, so that it cannot be controlled by mandamus.⁷ A justice of the peace, in making up and completing his records, acts ministerially, and may do so after the expiration of his term.⁸ Although the United States circuit court commissioners are magistrates, the chief supervisor of

¹ *Tracey v Corse*, 58 N. Y. 143, *aff'g* 45 How. Pr. (N. Y.) 316.

See also, *First Nat. Bank v Waters*, 19 Blatchf. (U. S.) 242.

² *People v Bush*, 40 Cal. 344.

³ *Betts v Dimon*, 3 Conn. 107.

⁴ *Tillotson v Cheetham*, 2 Johns. (N. Y.)

63, *per* Kent, Ch. J., pp. 70 *et seq.*

⁵ *Jackson v Buchanan*, 89 N. C. 74.

⁶ *Crane v Camp*, 12 Conn. 464.
See also, *Baldwin v Hewitt*, 88 Ky. 673.

⁷ *State v Edwards*, 51 N. J. L. 479.

⁸ *Matthews v Houghton*, 11 Me. 377.

elections, who must be one of their number, does not perform judicial duties.¹ A judge, entering an order of reference by consent, acts ministerially, and may do so although his relation is a party.² So, the entry of a default by the clerk of a court is a ministerial act, and the disqualification of the judge of the court does not disqualify the clerk from doing so.³ So, as we have already shown, it has been held in New York, that the granting of a writ of habeas corpus was a ministerial and not a judicial act.⁴ Numerous other cases in the same state, to examine which in detail would consume more space, than can be conveniently devoted to this question, establish similar distinctions between particular official acts.⁵

§ 540. **Instances of judicial acts by ministerial officer.**—The act of a clerk of the court in taxing costs is judicial.⁶ The act of a board of supervisors is judicial, when it requires new bonds from a county officer,⁷ or approves an official bond;⁸ or apportions a tax among the towns and wards of the county;⁹ or allows or rejects an account against the county.¹⁰ The act of a board of supervisors, dividing a town, and forming a new town from the portion set off, is legislative.¹¹

¹ *Dennison v United States*, 25 Ct. of Cl. (U. S.) 304.

² *Bell v Vernooy*, 18 Hun (N. Y.) 125.

³ *People v De Carrillo*, 35 Cala. 37.

⁴ *Nash v People*, 36 N. Y. 607, cited *ante*, § 534, per Davies, J., p. 615.

⁵ All the following cases were decided in the courts of New York:

Tompkins v Sands, 8 Wend. 462;

Easton v Calendar, 11 Wend. 90;

People v Collins, 19 Wend. 56;

Folsom v Streeter, 24 Wend. 266;

People v Taylor, 1 Abb. Pr., N. S., 200;

Foster v Van Wyck, 4 Abb. Pr., N. S., 469;

Parrott v Knickerbocker Ice Comp'y 8 Abb. Pr., N. S., 234;

People v Supervisors, 26 Barb. 118; 12 How. Pr. 204;

People v Supervisors, 43 Barb. 232;

People v Schoonmaker, 13 N. Y. 238, rev'g 19 Barb. 657;

In re Cooper, 22 N. Y. 67; 11 Abb. Pr. 301;

Metropolitan Board of Health v Heister, 37 N. Y. 661.

⁶ *Williams v Jones*, 2 Hill (S. C.) 555.

⁷ *People v Sup'rs*, 10 Cala. 344.

⁸ *Miller v Sup'rs*, 25 Cala. 93.

⁹ *People v Sup'rs*, 35 Barb. (N. Y.) 408.

¹⁰ *Post*, §§ 552, 553.

¹¹ *People v Carpenter*, 24 N. Y. 86.

§ 541. **When assessors' acts are judicial; their liability.**—The acts of assessors, in determining what property is liable to, and what is exempt from taxation; whether a person is or not a minister of the gospel, or other exempt person; the value of taxable property; and otherwise in making up the assessment roll; are essentially judicial in their character, and the assessment roll, when finally completed by the supervisors, stands as a judgment.¹ And, consequently, a court of equity has no power to restrain them by injunction, when they are proceeding unlawfully under a claim of right, as it may do in the case of ministerial acts.² But where they assess, for a tax upon personal property, one who was not a resident of the county, on the day fixed for that purpose, they are liable to an action, for in that case they act without jurisdiction.³

IV. *Officers' implied and incidental powers.*

§ 542. **General rule and instances.**—The rule respecting such powers is, that in addition to the powers expressly given by statute to an officer or a board of officers, he or it has, by implication, such additional powers, as are necessary for the due and efficient exercise of the powers expressly granted, or as may be fairly implied from the statute granting the express powers.⁴ Thus, a statute,

¹ *Barhyte v Shepherd*, 35 N. Y. 238, citing *Weaver v Devendorf*, 3 Denio (N. Y.) 117;

Vail v Owen, 19 Barb. (N. Y.) 22;

Brown v Smith, 24 Barb. (N. Y.) 419.

Accord, *Swift v Poughkeepsie*, 37 N. Y. 511;

Buffalo, etc., R. R. Comp'y v Sup'rs, 48 N. Y. 93;

Western R. R. Comp'y v Nolan, 48 N. Y. 513.

² *Western R. R. Comp'y v Nolan*, 48 N. Y. 513.

See also, *post*, ch. 31.

³ *People v Sup'rs*, 11 N. Y. 563;
Mygatt v Washburn, 15 N. Y. 316.

⁴ *Haynes v Butler*, 30 Ark. 69;
Pennington v Gammon, 67 Ga. 456;
Sherlock v Winnetka, 68 Ill. 530;
Holten v County Com'rs, 55 Ind. 194;
County Com'rs v Bunting, 111 Ind. 143;
Bass Foundry, etc., Works v Co. Com'rs, 115 Ind. 234;
County Com'rs v Barnett, 14 Kan. 627;
Mitchell v Co. Com'rs, 18 Kan. 188;
Slotts v Rockingham County, 53 N. H. 598;

Todd v Birdsall, 1 Cow. (N. Y.) 260;

Jackson v Brown, 5 Wend. (N. Y.) 590;

authorizing the board of supervisors of a county to "examine, settle, and allow" all accounts chargeable against the county, necessarily implies the right to reject an account.¹ And a statute, creating a board of commissioners for the erection of a public building, containing no limitation of their powers as to the mode of so doing, authorizes them either to enter into a contract for the work, or to construct the building under their immediate supervision.² But where a city charter defines the mode of conducting an election, and directs the mayor to declare the result, the mayor has no implied power to hear and determine protests.³

§ 543. **As to debts; issuing orders and loaning money.**—And supervisors, county commissioners, and similar officers, have no power to issue negotiable securities, to raise money for the purposes of transacting the business confided to them by law, which may not be impeached in the hands of subsequent *bona fide* holders.⁴ And it seems, that an interest bearing security cannot be lawfully issued in any case by such officers, in the absence of special statutory authority to do so.⁵ But it was held, in one case, that a county board, with power to make a building contract, may provide for payment of the sums payable thereupon, in county orders bearing interest.⁶

Marsh v Chamberlain, 2 Lans. (N. Y.) 237;

Hubbard v Sadler, 104 N. Y. 223;

Spalding v Preston, 21 Vt. 9;

Stevens v Kent, 26 Vt. 503;

Culpeper County v Gorrell, 20 Gratt. (Va.) 484;

State v Hastings, 10 Wis. 518.

¹ People v Sup'rs, 9 Wend. (N. Y.) 508.

² Danolds v State, 89 N. Y. 36, aff'g 28 Hun (N. Y.) 241.

³ Maxwell v Tolly, 26 S. C. 77.

S. P., Johnston v Corporation, etc., 1 Bay (S. C.) 441.

⁴ Police Jury v Britton, 15 Wall. (U. S.) 566.

See also, Stewart v Otoe County, 2 Nebr. 177.

⁵ Hardin County v McFarlan, 82 Ill. 138; Citizens Bank v Police Jury, 28 La. Ann. 263;

Mathé v Plaquemines Parish, 28 La. Ann. 77;

Smith v Madison Parish, 30 La. Ann. Part I, 461.

⁶ Jackson County v Rendleman, 100 Ill. 379; aff'g s. c., p. r. 8 Ill. App. 237.

Commissioners of highways, and other officers having public money in their hands, are so far authorized to loan such money, and to enforce the securities taken therefor, that no defence growing out of their official character can be sustained; although, *semble*, they are liable to the town or other municipality therefor.¹

§ 544. **As to bringing suits and settling controversies.**—Every public officer, although not expressly so authorized by statute, has implied authority to bring any suit, which may be required for the proper discharge of his official duties;² or, as a learned judge has expressed the doctrine, “all public officers, although not expressly authorized by statute, have a capacity to sue, commensurate with their public trusts and duties.”³ But this implied power is subject to the exception, that where the statute prescribes the means, by which a remedy may be obtained to enable them to discharge their trusts or execute their duties, that remedy only can be pursued.⁴ So a foreign officer, authorized to sue in his own country for property vested in him, may sue here.⁵ The power to sue for penalties for encroachments on the highways, conferred upon commissioners of highways by statute in New York, gives them implied authority to settle controversies touching such encroachments; and for that purpose they may take security, for the payment at a future day, of the sum agreed upon, and enforce the same.⁶

¹ Com'rs, etc., *v* Peck, 5 Hill (N. Y.) 215.

² Overseers, etc., *v* Overseers, etc., 18 Johns. (N. Y.) 407;

Todd *v* Birdsall, 1 Cow. (N. Y.) 260 and note.

See also, Grant *v* Fancher, 5 Cow. (N. Y.) 309;

Armine *v* Spencer, 4 Wend. (N. Y.) 406;

Silver *v* Cummings, 7 Wend. (N. Y.) 181;

Avery *v* Slack, 19 Wend. (N. Y.) 50;
Denton *v* Jackson, 2 Johns. Ch. (N. Y.) 320.

³ Supervisor *v* Stimson, 4 Hill (N. Y.) 136, per Bronson, J.

⁴ Cornell *v* Guilford, 1 Den. (N. Y.) 510, per Jewett, J., p. 515.

⁵ Peel *v* Elliott, 7 Abb. Pr. (N. Y.) 433; 16 How. Pr. (N. Y.) 481; *aff'd*, 28 Barb. (N. Y.) 200.

⁶ Com'rs, etc., *v* Peck, 5 Hill (N. Y.) 215.

§ 545. **Public officer cannot be deprived of powers by implication.**—A public officer cannot be deprived, by implication, of powers conferred upon him for public purposes.¹

V. When an officer's power and his duty are or are not coincident.

§ 546. **Generally this question belongs to statutory construction.**—The question now to be examined, to state the same in other words, is, when an officer has a discretion, whether or not to exercise a power conferred upon him, and when such exercise is obligatory. As the powers of officers are almost invariably conferred, by constitutional or statutory provisions, this question generally pertains to the subject of constitutional law or of statutory construction; but a few general observations thereupon will be appropriate in this place.

§ 547. **The effect of the use of permissive words.**—It is a well known rule of statutory construction, that where a public officer, or a board of officers, or other public body, is clothed by statute with power and furnished with means, to do an act required by the public interests, the exercise of such power is imperative upon such person or persons, although the word “may,” or other permissive or discretionary words, are used in the grant of power.² But where neither the public interests, nor the rights of individuals are concerned, a statute with permissive words is not imperative, but merely confers a discretionary power;³ and such is the rule generally, wherever there is nothing in the connection of the

¹ *Anderson v Van Tassel*, 53 N. Y. 631.

² *Stamper v Millar*, 3 Atk. 211;
Rex v Barlow, 2 Salk. 609; *Carth.* 293;
Backwell's Case, 1 Vern. 152;
Rex v Derby, *Skinner* 370;
Galena v Amy, 5 Wall. (U. S.) 705.

See also, *Phelps v Hawley*, 52 N. Y. 23,
 aff'g 3 Lans. (N. Y.) 160; and numer-
 ous other American cases.

³ *Newburgh Turnpike Company v Mil-
 ler*, 5 Johns. Ch. (N. Y.) 101;
Malcom v Rogers, 5 Cow. (N. Y.) 188.

language, or in the sense and policy of the provision, requiring that the provision should be construed as imperative.¹

§ 548. **Right to demand exercise of power, when permissive words are used.**—With respect to that class of cases, where an individual has an interest in the execution of the power, the rule was stated by the supreme court of Pennsylvania, as follows: “Where any person has the right to demand the exercise of a public function, and there is an officer or set of officers, authorized to exercise that function, there the right and the authority give rise to the duty; but where the right depends upon the grant of authority, and that authority is essentially discretionary, no legal duty is imposed.”² And the supreme court of New York stated the rule substantially to the same effect, adding that it was not altered by the fact that the statute used permissive words, as follows: “The officers of the corporation had a public duty to discharge. And, in general, where such a duty is imposed by statute, whether by words peremptory in themselves, as here, or merely permissive, as in the case of New York, they have no discretion to refuse its performance, as against a party having an interest in such performance.”³ So the supreme court of the United States held, that words in a statute of Illinois, providing that a board of supervisors, “may, if deemed advisable, levy a special tax,” etc., were peremptory and not permissive. Mr. Justice Swayne, after reviewing the adjudicated cases, concluded as follows: “The conclusion to be deduced from the authorities is, that where power is given to public officers in the language of the act before us, or in equivalent language,

¹ *Williams v People*, 24 N. Y. 405;
People v Grant, 58 Hun (N. Y.) 455.
 See also, *Dillon Mun. Corp.*, 4th ed.
 § 98 (* 62).

324, per Lowrie, Ch. J., p. 330.

³ *Martin v Mayor, etc.*, 1 Hill (N. Y.)
 545, per Cowan, J., p. 547; citing
Malcom v Rogers, 5 Cow. (N. Y.) 188.

² *Carr v Northern Liberties*, 35 Pa. St.

whenever the public interest or individual rights call for its exercise, the language used, although permissive in form, is in fact peremptory. What they are empowered to do for a third person, the law requires shall be done. The power is given, not for their benefit, but for his. It is placed with the depositary to meet the demands of right, and to prevent a failure of justice. It is given as a remedy to those entitled to invoke its aid, and who would otherwise be remediless.”¹

§ 549. **The rule qualified; instances.**—But the interest, which entitles a private person to insist upon the execution by an officer, of a power conferred upon him, must be a definite and absolute legal right; a mere incidental benefit, to accrue to him therefrom, will not suffice. Thus, where the trustees of the then village of Brooklyn, pursuant to a statutory power, took proceedings to lay out certain streets, and continued the same to the point where the damages were assessed, but failed to file and procure the confirmation of the report; it was held that a person, whose land was to be taken and to whom damages had been awarded, could not maintain an action against the village, founded upon their failure to proceed, although the statute provided that the trustees “shall” cause the report to be filed at the next term of a designated court, and the court “shall” by order confirm it. The court, after stating the general rule,² continued: “It will be seen by these cases, however, I apprehend, that whatever the words of the statute may be, we must look to the party for whose benefit the proceeding is to be had. . . . For whose benefit is this? Clearly for that of the public; more immediately for the benefit of that portion of the public, who were residents of the village of Brooklyn. Neither make any complaint that nothing

¹ *Supervisors v United States*, 4 Wall. (U. S.) 435.

512;

Smith v State, 1 Kan. 365.

Accord, Logansport v Wright, 25 Ind.

² *Ante*, § 548.

was done. In that respect, so far as the public interest and public duty of the trustees were in question, every thing is right. Did they owe any public duty, as officers, to the plaintiff? Can he complain that they have omitted to lay out streets that the public do not want? . . . As an individual, he can have no interest, except in obtaining payment for his land; and he accordingly complains, that the trustees would not put the corporation in such a position, that he could compel them to pay. They say: 'We prefer, for reasons satisfactory to ourselves, to stay proceedings, at least for the present.' It is the same thing to the plaintiff. He does not, to be sure, get the money for the land; but he holds an equivalent, the land itself. He is deprived of nothing in this respect, and can have no such interest, as to give the statute a mandatory operation in his favor as a mere individual. But he complains that a cloud has been brought over his title; that he has been prevented from raising money on his land, and incurred other disadvantages by the delay; . . . that on the faith of the proceedings being consummated, he had pulled down his rope-walks and stone building on the land, and built in another place; that he has erected three new buildings, in reference to one of the contemplated streets; and that the opening of the streets would have benefited his other lands, etc. The speculative disadvantages, arising from such proceeding being kept pending for a long time, may be considerable; but we cannot recognize them as the subject of an action against the officers, commissioned to prosecute such proceedings, or the corporation which they represent. In the nature of things, such officers must exercise a discretion on the question whether the public shall be finally committed; and courts must hold such consequences as are here complained of to be *damnum absque injuria*." ¹

¹ *Martin v Mayor, etc.*, 1 Hill (N. Y.) 545.

Accord, *In re Washington Park*

Com'rs, 56 N. Y. 144.

See also, *People v Common Council*, 78 N. Y. 56.

§ 550. **The same subject; other instances.**—So it was held, that a statute, empowering a trust company to become the administrator of certain decedents' estates, and authorizing the surrogate to issue letters accordingly, conferred no absolute right on the trust company to the administration, under the rule that permissive words in a statute may be construed, as imposing an imperative duty upon the officer referred to. The court said, that if the refusal of the surrogate to grant such letters would result in the absolute omission of administration, a different question would be presented; but the result to the public and to the individuals interested is the same, in whatever mode the power of appointment may be exercised; so that neither the next of kin nor the public are interested, "in the sense that any legal right of theirs is impaired," by the omission of the surrogate to appoint the trust company.¹

VI. Effect of an exercise of power by an officer.

§ 551. **Effect of exercise by officer empowered.**—A contract, entered into in behalf of the state, by public officers, empowered by statute, either expressly or by implication, to make the same, binds the state, as a contract by an individual, made through his authorized agent, binds him; and the provision in the constitution of the United States, forbidding a state to pass a law impairing the obligation of contracts, prevents the state from avoiding or destroying the obligation of the contract by legislation; and if the state thus refuses to perform, and arrests the performance by the contractor, it is liable to the latter, to the same extent as an individual is liable for the breach of such a contract, including for prospective profits.² But the rule is different, where an

¹ *In re Goddard*, 94 N. Y. 544, per Ruger, Ch. J., at p. 552.

² *Danolds v State*, 89 N. Y. 36, aff'g 26

Hun (N. Y.) 241.

S. P., *Boyers v Crane*, 1 W. Va. 176.

See also, *People v Stephens*, 71 N. Y. 527, aff'g 6 Hun (N. Y.) 390.

officer exceeds his powers; in such a case, the body for which he acts, whether it is the state, a municipal corporation, or other public organization, is not bound by his acts; and every person dealing with an officer must, at his peril, ascertain the extent of his powers.¹ In this respect, the rule is more stringent, respecting public officers and agents, than it is respecting private agents; the former are held more strictly within the limits of their prescribed powers, than the latter; and a contract, made by a public agent, relating to a subject within the general scope of his powers, does not bind his principals, if there was a want of specific power to make it.² With respect to cities, and other municipal corporations, the general rule is, that the body is liable for the acts or omissions of its officers in the lawful discharge of a corporate duty, imposed by law upon the body itself; but not where the act is for the general public interest, or where the statute specifically imposes the duty upon the officer.³ The gov-

¹ *Tamm v Lavalley*, 92 Ill. 263;
Mitchell v County Com'rs, 24 Minn.
 459;

Cheaney v Brookfield, 60 Mo. 53.

Accord, *Barton v Swepston*, 44 Ark.
 437;

Dorsey Co. v Whitehead, 47 Ark. 205;

Butler v Bates, 7 Cala. 136;

Sutro v Pettit, 74 Cala. 332;

Dement v Rokker, 126 Ill. 174;

Ristine v State, 20 Ind. 328; s. c. p. r.
 id. 345;

*Bloomington, etc., v National School
 F. Company*, 107 Ind. 43;

Burchfield v New Orleans, 42 La. Ann.
 235;

*Lowell F. C. Savings Bank v Win-
 chester*, 8 Allen (Mass.) 109;

Spitzer v Blanchard, 82 Mich. 234;

Bemis v County Com'rs, 23 Minn. 73;

National Bk. of Chemung v Elmira,
 53 N. Y. 49;

McDonald v Mayor, etc., 68 N. Y. 23;

Davis v Co. Com'rs, 74 N. C. 374;

Daniel v County Com'rs, 74 N. C. 494;

State v Bevers, 86 N. C. 588;

Citizens' Bk. v Terrell, 78 Tex. 450;

Floyd Acceptances, 7 Wall. (U. S.) 666;

Merch'ts Bk. v Bergen Co., 115 U. S.
 384.

State v Hastings, 12 Wis. 596; and
 numerous other cases.

² *Parsel v Barnes*, 25 Ark. 261;

Parsel v Merchants' Nat. Bank, 25
 Ark. 272.

³ *Prince v Lynn*, 149 Mass. 193;

Detroit v Blackeby, 21 Mich. 84, at p.
 113;

*Asbestine Tiling, etc., Comp'y v
 Hepp*, 39 Fed. (U. S.) 324.

See also, *post*, § 593, where the subject
 is further considered, together with
 the liability of counties, etc., in sim-
 ilar cases.

ernment is never estopped, on the ground that its agent is acting under an apparent authority, which is not real;¹ but a county, city, or other municipal body is thus estopped, in like manner as an individual, subject to the exception that the act must be within its corporate powers;² and either the state, or, subject to the same exception, a municipal body, may ratify the act of its officer, in excess of his actual power.³

§ 552. **Generally judicial and quasi judicial acts are conclusive.**—As a general rule, judicial and *quasi* judicial acts are conclusive, except where a method of reviewing the same is given by statute; and then they are conclusive for every purpose, except for the purpose of such a review. Thus it was held, that the commissioners of public parks in Chicago, in making assessments for benefits upon property, act in a *quasi* judicial capacity; and their decision, as to what property shall be omitted from or included in such an assessment, cannot be questioned, except for fraud.⁴ So it has been ruled in several cases, that county commissioners, supervisors, and other similar bodies, in deciding upon claims against the county, parish, or other municipality, act judicially, and their decision thereupon is conclusive, except in case of fraud, or where a direct review thereof is given by statute.⁵ So, where

¹ Bishop on Contracts, revised ed'n., §§ 310, 993, and cases cited.

² Davies v Mayor, etc., 93 N. Y. 250, and cases cited.

See also, Cook Co. v Harms, 103 Ill. 151;

Detroit v Jackson, 1 Dougl. (Mich.) 106;

Clay Co. v Savings Soc., 104 U. S. 579;

Sherman Co. v Simons, 109 U. S. 735;

³ Nelson v Mayor, etc., 63 N. Y. 535, as explained in McDonald v Mayor, etc., 68 N. Y. 23, and Smith v Newburgh, 77 N. Y. 130.

See also, Detroit v Jackson, 1 Dougl. (Mich.) 106;

State v Torinus, 26 Minn. 1;

Green v Cape May, 41 N. J. L. 45;

Illinois v Delafield, 8 Paige (N. Y.) 527;

Peterson v Mayor, etc., 17 N. Y. 449;

O'Hara v State, 112 N. Y. 146.

⁴ Elliott v Chicago, 48 Ill. 293.

⁵ Babcock v Goodrich, 47 Cal. 488, 513; Colusa County v De Jarnett, 55 Cal. 373;

County Com'rs v Graham, 4 Colo. 201; Fitzgerald v Harms, 92 Ill. 372;

county commissioners, in the exercise of the judgment and discretion confided to them, have acted in the matter of regulating a grade crossing of a highway by a railroad, their decision is conclusive upon every one.¹

§ 553. **Exercise of discretionary power, governed by same rule.**—As was stated in a former part of this chapter,² where, in the exercise of a power, an officer is vested with a discretion, his act is regarded as *quasi* judicial. So the rule is, that where power or jurisdiction is delegated to a public officer or tribunal, over a subject matter, and its exercise is confided to his or its discretion, an act in exercise thereof is binding as to such subject matter.³ “The board of supervisors is a special tribunal, with mixed powers, administrative, legislative, and judicial. . . . Its judgments or orders cannot be attacked in a collateral way” (where it has jurisdiction) “any more than the judgments of a court of record.” Where the statute confers upon it a discretion “its judgment is conclusive. . . . Its judgments or orders cannot be collaterally impeached, whether it acted upon sufficient or insufficient proof, regularly or irregularly.”⁴ And where a board of supervisors, county commissioners, or similar officers, have a discretionary power, the exercise thereof

State v Buckles, 39 Ind. 272;

County Com'rs v Gregory, 42 Ind. 32;

County Com'rs v Richardson, 54 Ind. 153;

Maxwell v Co. Com'rs, 119 Ind. 20;

Brown v Otoe County, 6 Nebr. 111;

State v Buffalo County, 6 Nebr. 454;

Dixon County v Barnes, 13 Nebr. 294;

Sup'rs v Briggs, 2 Denio (N. Y.) 26;

Chase v Saratoga Co., 33 Barb. (N.Y.) 603;

People v Stocking, 50 Barb. (N. Y.) 573;

People v Sup'rs, 52 Hun (N. Y.) 446.

Contra, see § 554.

¹ Brewer v Boston, etc., Railroad

Comp'y, 113 Mass. 52.

² Ante, § 533.

³ United States v Arredondo, 6 Pet. (U. S.) 691, at p. 729;

Allen v Blunt, 3 Story (U. S.) 742;

See also, Oswego Falls Bridge Comp'y v Fish, 1 Barb. Ch. (N. Y.) 547;

Charles River Bridge Comp'y v Warren Bridge Comp'y, 11 Peters (U. S.) 420.

⁴ Waugh v Chauncey, 13 Cala. 11.

Accord, Martin v Sup'rs, 29 N. Y. 645; State v McGarry, 21 Wis. 496; and cases cited in note (5) to the last preceding section.

cannot be reviewed, even upon a statutory appeal, unless the statute expressly allows such a review.¹

§ 554. **Excess of power; allowance of accounts by supervisors, etc.**—But, of course, if the officer or board attempts to exercise a power, either judicial or ministerial, in a case to which his or its jurisdiction does not extend, the act is either absolutely void, or voidable by judicial proceedings, as the case may be. And it has been held, in some cases, that this rule applies, where county commissioners, supervisors, or other similar officers, allow a claim which is not legally chargeable, on the ground that such an act is an excess of power.² Indeed, in some of the cases, the proposition, that the allowance or disallowance of accounts by such officers is a judicial act, is denied; and it is holden that such an act is ministerial. Thus, in a case in Indiana, it was held that the annual settlement of the treasurer's accounts by the county commissioners is not a judicial act, and is no more conclusive than a settlement between private persons.³ So, in Mississippi, it was held, that in examining and approving the reports of the county treasurer, the duties of supervisors are ministerial; they cannot fix any liability upon him, or discharge him from any, by their decision. If they allow him items, appearing upon the face of the reports to be illegal, that is not a conclusive adjudication, which will protect him and his sureties in, a suit upon his official bond.⁴ But in each of these cases, the decision appears to have turned upon the language of the statute, or the

¹ *Brown v Porter*, 37 Ind. 206;
Sims v County Com'rs, 39 Ind. 40;
County Com'rs v Elliott, 39 Ind. 191;
Dudley v Blountsville, etc., Turnpike
Comp'y, 39 Ind. 288;
County Com'rs v Barnett, 14 Kan. 627;
State v County Com'rs, 12 Nebr. 6;
Long v County Com'rs, 76 N. C. 273,
 See also, *ante*, §§ 393-396, 398.

² *State v County Com'rs*, 14 Neva. 66;
Richland County v Miller, 16 S. C. 244.
 See also, *Rothrock v Carr*, 55 Ind. 334;
State v Clarke, 73 N. C. 255;
Davis v County Com'rs, 4 Mont. 292.

³ *Sup'rs v Catlett*, 86 Va. 158.

⁴ *Hunt v State*, 93 Ind. 311.

⁵ *Howe v State*, 53 Miss. 57.

peculiar character of the auditing officers' duties, with respect to the particular accounts in question, without impairing the general rule, that the allowance of a claim is a judicial act, and so conclusive.¹

§ 555. **Where exercise of discretionary power reviewable by courts.**—But the exercise of a discretionary power is always subject, in some respects, to review by the courts. The exception, where it was tainted with fraud, has been stated in some of the foregoing citations, and is a well established rule of law. So it may be reviewed, where it has violated some rule of public policy, as where it has been exerted for the benefit of the officer exercising it.² And of course it will be violated by any illegality or excess of jurisdiction. And a court of equity has power to review the exercise of a discretionary power, vested in a public officer, whenever its interference is necessary, in order to prevent abuse, injustice, oppression, or the violation of a trust, as well as in a case of fraud.³

VII. Rule that a power given by statute must be strictly pursued; presumptions in support of the regularity of the exercise thereof.

§ 556. **Statutory power, and rule as to claims under it.**—The general rule has already been incidentally stated, in some of the cases cited in the foregoing sections of this chapter.⁴ A ministerial officer or board of officers has only such powers as are conferred on him or it by statute, either expressly or by necessary implication; and he or it must comply strictly with the provisions of the statute, regulating the exercise of those powers, otherwise the

¹ See *Wolfe v State*, 90 Ind. 16.

² *Post*, ch. 26.

³ *Hill v Thompson*, 48 N. Y. Super. Ct.

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See also, *Davis v Mayor*, etc., 1 Duer (N. Y.) 451, aff'd as *People v Sturtevant*, 9 N. Y. 263.

⁴ *Ante*, §§ 541, 551, 554.

act or decision will be a nullity.¹ A naked power, conferred by law upon an officer or a private person, must be strictly followed, especially if its execution will result in a forfeiture; and one, claiming a right under the exercise of such a power, must show that it was strictly pursued, in accordance with the directions of the law.²

§ 557. **Where call of special session of supervisors does not specify business.**—Thus, if a statute requires a board of supervisors, or of county commissioners, or other similar officers, to transact business only at a regular and stated meeting, or at a special meeting called by a notice, specifying the business to be transacted; any act done at a special meeting, not pertaining to the business specified in the notice calling the meeting, is a nullity.³ But a statute, requiring the supervisors to act upon a particular matter at a particular term, does not prevent them from taking final action thereupon at a subsequent term; if the business was entered upon at the specified term.⁴

§ 558. **Presumptions and intendments.**—And the presumption is always in favor of the correct performance of his duty by an officer; and every reasonable intendment will be made in support of such presumption.⁵ So,

¹ *Glass v Ashbury*, 49 Cal. 571;
Green v Beeson, 31 Ind. 7;
Wiseman v Lynn, 39 Ind. 250, at p. 258;
Hull v Marshall Co., 12 Iowa, 142;
Vose v Deane, 7 Mass. 280;
State v Bank, 45 Mo. 528;
State v Hays, 52 Mo. 578;
Waldron v Berry, 51 N. H. 136;
Stearns v Wright, 51 N. H. 600;
State v Bevers, 86 N. C. 588;
Whiteside v United States, 93 U. S. 247;
Silliman v Fredericksburg, etc., R. R. Comp'y, 27 Gratt. (Va.) 119;

² *Osborne v Tunis*, 25 N. J. L. 633;
Nalle v Fenwick, 4 Rand. (Va.) 585;
Yancey v Hopkins, 1 Munf. (Va.) 419.

Accord, Bloom v Burdick, 1 Hill (N. Y.) 130.

³ *El Dorado County v Reed*, 11 Cal. 130;
Vincennes v Windman, 72 Ind. 218;
Paola, etc., R. R. Comp'y v Co. Com'rs, 16 Kan. 302;
Goedgen v Manitowoc County, 2 Biss. (U. S.) 328.

Contra, in part, *County Com'rs v Kent*, 5 Nebr. 227.

⁴ *Hoxie v Shaw*, 75 Iowa, 427.

⁵ *Brandon v Snows*, 2 Stew. (Ala.) 255;
Vaughn v Biggers, 6 Ga. 188;
People v Auditor, 3 Ill. 567;
Washington v Hosp, 43 Kan. 324;
Bergman v Bullitt, 43 Kan. 709;

it will always be presumed, that in any official act, or act purporting to be official, the officer has not exceeded his authority; and, if he had power to act only in a certain contingency, that the contingency has happened; where there is no evidence on either side with respect thereto.¹ “The presumption is that no official person, acting under oath of office, will do aught which it is against his official duty to do, or will omit to do aught which his official duty requires should be done.”²

§ 559. **Do not include a vital jurisdictional fact; cases.**—The application of this rule, and the exceptions and qualifications to which it is subject, constitute an important part of the law of evidence, and could not be exhaustively treated here, without departing from the plan of this work, and greatly increasing its bulk. It will suffice to state here, generally, the principles upon which the exceptions and qualifications rest, and to cite a few examples of their application. The ordinary presumption, that an officer has done his duty, will not be allowed to sustain a vital jurisdictional fact;³ but if the fact itself is made out by independent proof, and the

Terry v Bleight, 3 T. B. Mon. (Ky.) 270;

Davany v Koon, 45 Miss. 71;

Owen v Baker, 101 Mo. 407;

Bailey v Winn, 101 Mo. 649;

Hartwell v Root, 19 Johns. (N. Y.) 345;

Farr v Sims, Rich. Eq. Cas. (S. C.) 122,
at pp. 131, 132;

Henderson's Lessee v Robertson,
Cooke (Tenn.) 207, at p. 210;

Blount v Ramsey, *Cooke* (Tenn.) 489;

Rogers v Jennings's Lessee, 3 Yerg.
(Tenn.) 308;

Barry's Lessee v Rhea, 1 Tenn. (Overt.)
345, at p. 348;

Philip's Lessee v Robertson, 2 Tenn.
(Overt.) 399, at p. 421;

Polk's Lessee v Hill, 2 Tenn. (Overt.)
118, at p. 154;

Williamson's Heirs v Buchanan, 2

Tenn. (Overt.) 278, at pp. 285, 286;

Downing v Rugar, 21 Wend. (N. Y.) 178;

Thurman v Cameron, 24 Wend. (N. Y.)
87;

Miller v Lewis, 4 N. Y. 554;

United States v Hayward, 2 Gall.
(U. S.) 485;

Adams v Jackson, 2 Aik. (Vt.) 145.

¹ *Den v Den*, 6 Cala. 81;

Lowell v Flint, 20 Me. 401;

Miller v Lewis, 4 N. Y. 554.

² *Mandeville v Reynolds*, 68 N. Y. 528,
aff'g 5 Hun (N. Y.) 338, per Folger,
J., p. 534; citing *Lazier v Westcott*,
26 N. Y. 146;

Bank of United States v Dandridge,
12 Wheat. (U. S.) 64, at pp. 69, 70.

³ *Albany v McNamara*, 117 N. Y. 168.

jurisdiction depended upon the time when it occurred, the law will presume that it occurred at the proper time.¹ “To found the power to act against a private right of property, there must be affirmative proof of a compliance with the prerequisites; it is a jurisdictional fact, which may not be presumed or inferred.” Hence, where a statute empowers the common council of a city to take lands for streets, provided the resolution for that purpose is adopted by a vote of two thirds of the members, it will not suffice to prove the passage of the resolution; there must be affirmative proof that it received a vote of two thirds.²

§ 560. **Instances where no presumptions; tax sales, etc.**—The rule, that officers will be presumed to have done their duty, does not extend to agents, appointed by the legislature *pro hac vice*, to sell lands for the payment of the owner's debts; the correctness of their proceedings must be affirmatively proved, in order to sustain a title under a sale by them.³ Nor does it extend to a case where a title is made under a tax sale; there the party is held to peculiar strictness in proving all the facts which confer jurisdiction to make the sale, and show the sale to have been regularly made. “When a person seeks, by a purchase of a valuable property for a trifling sum, at a tax sale, to cut off the title of the owner, it behooves him to see to it, that the proceedings have all been in substantial accordance with the requirements of law, and that the proper evidence of the same has been preserved. . . . Courts will not aid in supplying funda-

¹ *Sheldon v Wright*, 7 Barb. (N. Y.) 39.

² *In re Buffalo*, 78 N. Y. 362, per Folger, J., at p. 366; aff'g s. c. sub nom., *In re Carlton Street*, 16 Hun (N. Y.) 497.

See also, *Sharp v Speir*, 4 Hill (N. Y.) 76; *Dyckman v Mayor, etc.*, 5 N. Y. 434; *In re Marsh*, 71 N. Y. 315.

³ *Pitman v Brownlee*, 2 A. K. Marsh. (Ky.) 210.

mental defects in such a case by presumptions.”¹ So commissioners of highways, in laying out highways, act under a special statutory authority; and it must appear, on the face of the proceedings, or by proof *aliunde*, that they acquired jurisdiction in the particular case; and a record, purporting to be a record of a highway laid out by them, which fails to show affirmatively that jurisdiction was acquired, cannot be helped out by intentment or presumption, based upon the fact that the commissioners were public officers, acting in discharge of a public duty.²

§ 561. **Other instances.**—And the presumption does not apply, in actions against a sheriff or other ministerial officer, for the recovery of money collected by him upon

¹ *Hilton v Bender*, 69 N. Y. 75, per Church, Ch. J., at p. 83;
See also, Cooley on Taxation, 2d ed. 470, 471;

Pope v Headen, 5 Ala. 433;
Lyon v Hunt, 11 Ala. 295;
Elliott v Eddins, 24 Ala. 508;
Lachman v Clark, 14 Cal. 131;
Keane v Cannovan, 21 Cal. 291;
Brooks v Rooney, 11 Ga. 423;
Garrett v Doe, 2 Ill. 335;
Lane v Bommelmann, 21 Ill. 143,
Perry v Burton, 126 Ill. 599;
Anderson v McCormick, 129 Ill. 308;
Gavin v Shuman, 23 Ind. 32;
Ellis v Kenyon, 25 Ind. 134;
Gaylord v Scarff, 6 Iowa 179;
McGahen v Carr, 6 Iowa 331;
Brown v Veazie, 25 Me. 359;
Matthews v Light, 32 Me. 305;
Worthing v Webster, 45 Me. 270;
Bonham v Weymouth, 39 Minn. 92;
West v St. Paul, etc., R. R. Com'y, 40 Minn. 189;
Annan v Baker, 49 N. H. 161;
Hubbell v Weldon, Hill & Denio (N. Y.) 139;

Hoyt v Dillon, 19 Barb. (N. Y.) 644;
Bunner v Eastman, 50 Barb. (N. Y.) 639;
Beekman v Bigham, 5 N. Y. 366;
Jewell v Van Steenburgh, 58 N. Y. 85;
People v Cady, 51 N. Y. Super. Ct. 316, aff'd 99 N. Y. 620;
Eastern Land, etc., Comp'y v State B'd Education, 101 N. C. 35;
Kellogg v McLaughlin, 8 Ohio 114;
Thompson v Gotham, 9 Ohio 170;
Emery v Harrison, 13 Pa. St. 317;
Kelly v Medlin, 26 Tex. 48;
Telfener v Dillard, 70 Tex. 139;
Dawson v Ward, 71 Tex. 72;
McClung v Ross, 5 Wheat. (U. S.) 116;
Ronkendorff v Taylor, 4 Pet. (U. S.) 349;
Stead v Course, 4 Cranch (U. S.) 403;
Parker v Rule, 9 Cranch (U. S.) 64;
Little v Herndon, 10 Wall. (U. S.) 26;
Brown v Wright, 17 Vt. 97;
Judevine v Jackson, 18 Vt. 470;
Townsend v Downer, 32 Vt. 183;
Allen v Smith, 1 Leigh (Va.) 231;
Nalle v Fenwick, 4 Rand. (Va.) 585.

² *Miller v Brown*, 56 N. Y. 383.

an execution.¹ And although, where an officer is required to do a certain thing, and, upon his certifying that he has done it, the certificate will be taken to be true, he must certify to having done all that the law requires him to do; otherwise the certificate will not suffice, for there is no presumption which will supply an omission in that respect.² Nor will the law allow a presumption in favor of the performance of his duty by one officer, for the purpose of establishing that another officer has failed in the performance of his duty.³

§ 562. **Proof where equity is invoked.**—Where a party invokes the aid of a court of equity to set aside official proceedings, conducted under a statutory power, the rule that the proof must show that the power was strictly pursued, in order to support the proceedings, does not apply; and the plaintiff is bound affirmatively to prove the facts which show invalidity of the proceedings.⁴

VIII. Miscellaneous rulings respecting officers' powers and duties.

§ 563. **Whether power is continuous, or exhausted by one act.**—The question, whether a power conferred by the legislature upon one or more officers, to do a particular act, is to be deemed a continuous power, to be exercised by the officers named, or their successors, as often as an emergency arises of the same character as that provided for, or whether it is exhausted by a single exercise of it, is often one of no little difficulty. The considerations, upon which the answer to the question depends, were stated in a case in the court of appeals in New York,

¹ O'Brien v McCann, 58 N. Y. 373, per Grover, J., at p. 375.

² Lawson v Pinckney, 40 N. Y. Super. Ct. 187.

³ Weimer v Bunbury, 30 Mich. 201.
See also, Sup'rs v Rees, 34 Mich. 481.

⁴ Tingue v Port Chester, 101 N. Y. 294.
See also, *In re Bassford*, 50 N. Y. 509;
Heinemann v Heard, 62 N. Y. 448;
In re Ingraham, 64 N. Y. 310;
In re Hebrew Benevolent Asylum, 70 N. Y. 478;
In re Voorhis, 90 N. Y. 668.

where a controversy arose respecting the effect of a statute, providing for the designation of a state paper by the secretary of state, the state comptroller, and the state treasurer, and directing them to enter into a contract with the proprietors of the newspaper so designated for the publication of legal notices, etc. The officers so named designated a state paper, and entered into such a contract with the proprietors, for the term of four years, or until the designation of a new paper; no time for the duration of the contract being specified in the statute. At the expiration of the four years, the successors of the officers named designated a different paper, and entered into a contract with the proprietors thereof for another term of four years; whereupon this action was brought, by the proprietors of the paper first designated, to establish their right to continue to be the state paper, and for an injunction. The court, in an extended opinion, reviewed the history of previous legislation on that subject, and concluded that the act was to be regarded, as "a permanent measure, to secure the publication of the legal notices, not temporarily, for the life of one man, or of a single firm of business men, or the continuance of a particular business enterprise; but as an arrangement which was to exist in perpetuity;" and in view of those facts, and the consequences which would ensue, in case of the death or failure of the contractors, if the power should be regarded as exhausted by one act, that the legislature intended that the notices should be published "under contracts to be made with the state officers as occasion may require;" and thereupon directed judgment for the defendants.¹

¹ *Weed v Tucker*, 19 N. Y. 422, per Denio, J., at p. 429;

A distinction is taken, between a power to make contracts, and a power to appoint to office, in *People v Woodruff*, 32 N. Y. 355, at p. 369; s. c. 29 How.

Pr. (N. Y.) 203.

See also, *People v Allen*, 42 Barb. (N. Y.) 203;

Daily Register, etc., *Comp'y v Mayor*, etc., 52 Hun (N. Y.) 542.

§ 564. **Rule as to exercise of quasi judicial powers.**— Obviously no general rule can be laid down, which will cover all cases of this character; for each must depend upon its own peculiar circumstances. It has been held, in several cases, that where a *quasi* judicial power has been exercised, upon which a private individual has acquired rights, the rule is the same, as where a judgment has been rendered by a court of inferior and limited jurisdiction; that is, that the officer or body can exercise the power only once, and cannot afterwards alter his or its decision.¹ We have considered the same question, with reference to the exercise of the power of appointment to office, in a preceeding chapter.²

§ 565. **Presumption as to policemen, and U. S. officers.**—Where it did not appear that any ordinance was enacted by a municipal council, defining the powers and duties of policemen, but it appeared that policemen were appointed, pursuant to a statute providing for such appointment; it was held that they had presumptively the common law powers of peace officers.³ There is no difference in powers of the same character of officers, whether they perform their duties under the national or the state government; the common law applies to both. Thus a provost marshal of the United States possesses the same powers, with respect to the military courts, that peace officers possess with respect to the civil courts.⁴

§ 566. **Justice U. S. supreme court and patrol duty.**— It has been held, that a justice of the supreme court of the United States is not bound to perform duties, imposed by a statute upon citizens of the state, which are inconsistent

¹ *People v Sup'rs*, 35 Barb. (N. Y.) 408.
See also, *Sup'rs v Briggs*, 2 Denio (N. Y.)
26;

Jermaine v Waggener, 1 Hill (N. Y.)
279;

Woolsey v Tompkins, 23 Wend. (N. Y.)
324;

People v Ames, 19 How. Pr. (N. Y.) 551.
Compare *People v Stocking*, 50 Barb.
(N. Y.) 573.

² *Ante*, §§ 88-90, and 349.

³ *Doering v State*, 49 Ind. 56.

⁴ *Hawley v Butler*, 54 Barb. (N. Y.) 490.

with the performance of his judicial duties; and this, although the statute allows him to perform the duties by a substitute. Accordingly, a writ of prohibition was granted, against the enforcement of a statutory penalty against such a judge, for his failure to perform patrol duty.¹

§ 567. **As to officer's good faith and motives.**—It is always to be presumed, that a public officer has acted with ordinary caution and in good faith.² And where an officer is justified by law in doing an act, his motives cannot be inquired into, for the purpose of affecting the validity of his act, or of founding an action against him on the allegation of malice in its performance.³ So the unlawful or malicious motives of the party, in suing out legal process, although known to the officer, will not excuse him from executing it, or prevent its affording him protection, if it is lawful and regular upon its face, and upon the face of the accompanying papers, if any such are required;⁴ and such is the rule, although there was fraud and collusion between the parties.⁵

§ 568. **Effect of officer's lawful acts and intent.**—And if an officer's act is valid, under a statute in force, it is valid, although, in executing it he was guided by, and undertook to act under, some other statute which was invalid or insufficient.⁶ The effect of a town officer's act, in pursuance of his official duty, cannot be obviated by proof of his private intent not to bind the town, as where a highway commissioner's acts amount in law to an acceptance of a bridge, dedicated to the public.⁷

¹ *State v Martindale*, 1 Bailey (S.C.) 163.

Taylor v Alexander, 6 Ohio, 144.

² *Smyth v Munroe*, 84 N. Y. 354, at p. 360, aff'g 19 Hun (N. Y.) 550.

⁴ *State v Weed*, 21 N. H. 262.

⁵ *Seaver v Pierce*, 42 Vt. 325.

³ *Webster v Washington County*, 26 Minn. 220;

⁶ *Davis v Brace*, 82 Ill. 542.

Moran v McClearns, 4 Lans. (N. Y.) 288;

⁷ *Dayton v Rutland*, 84 Ill. 279.

CHAPTER XXIV

DELEGATION OF POWERS; DEPUTIES

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Chap. XXIV.] DELEGATED POWERS

- SEC. 579. American cases establish the same rule; but if deputy entitled by law to certain perquisites, an agreement to pay part of them to principal is void; so agreement for a salary, where statute fixes a portion of the profits as the deputy's, is void; so to pay principal more than his statutory proportion.
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I. What official powers may or may not be delegated.

§ 569. **Common law rules.**—Upon this question, we will first cite the old English authorities. Bacon says: "As to the execution of an office by deputy, we must observe that there are some offices, which, in their nature and constitution, imply a power or right of exercising them by deputy; some that, in their nature, cannot be exercised by deputy; and some that, by having such a power annexed to the grant or institution, may be so exercised, though without such an express provision they could not. . . . Offices of inheritance, for years, and those which require only a superintendency, and no particular skill, may be regularly exercised by deputy; such as that of the earl-marshal of England, forester, parkkeeper, etc."¹ "A judicial officer cannot, it is said, make a deputy, unless he hath a clause in his

¹ Bac. Abr., tit. Offices and Officers, L.

patent to enable him, because his judgment is relied on in matters relating to his office, which might be the reason of making the grant to him; neither can a ministerial officer depute one in his stead, if the office be to be performed by him in person; but where nothing is required but a superintendency in the office, he may make a deputy.”¹ So the judges of Westminster Hall, “as well as all others having judicial authority, must hold their courts in their proper persons, and cannot act by deputy, or in any way transfer their power to another.”² And a coroner or escheator cannot make a deputy, for these are judicial officers.³ To which Comyn adds, that where the officer holds in fee by personal service, he may make a deputy, for the estate may descend to a woman, or an infant, etc., who is incapable to do it in person.⁴ “So, if an office of labour of small regard be granted to a peer, he, in respect of the dignity of his person, may make a deputy; as if a peer be made steward of a court baron, parker,” etc.⁵

§ 570. **American cases; what powers may and may not be executed by deputy.**—These principles have been declared and applied, as far as they are adapted to our institutions, and expanded, in the American authorities. Thus, the rule is well settled here, that ministerial powers may generally be executed by deputy, but judicial powers may not.⁶ The distinction between judicial and min-

¹ *Id.*, giving in the note instances of ministerial officers, who cannot make deputies, as the esquire of the king's person, and carver.

Accord, Com. Dig., tit. Officer, D1; D2.

² Bac. Abr., tit. Offices and Officers, L. “But” a note adds, “the judges of the ecclesiastical courts may act by deputy, as the ancient custom hath been.”

Accord, Com. Dig., tit. Officer, D2.

³ Bac. Abr., *ubi supra*. Com. Dig., tit. Officer, D1; D2.

⁴ Com. Dig., tit. Officer, D, 1.

See also, on this subject, *ante*, §§ 67, *et seq.*

⁵ Com. Dig., *ubi supra*.

⁶ *Abrams v Ervin*, 9 Iowa 87;
Page v Hardin, 8 B. Mon. (Ky.) 648, at p. 662;
Lewis v Lewis, 9 Mo. 182;
Edwards v Watertown, 24 Hun (N. Y.) 426;
People v Bank of N. America, 75 N. Y. 547;
Kirkwood v Smith, 9 Lea (Tenn.) 228.

isterial powers, as recognized in this country, was considered in the last preceding chapter.¹ It was there said, that the rules of law, applicable to such powers, are applied in accordance with the particular nature of the power in question, without regard to the general character of the functions of the officer. And this principle applies, with respect to the power of delegation. Thus, where an officer's powers are partly ministerial and partly of a judicial nature, the exercise of the former may be given to a deputy, but not that of the latter.²

§ 571. **As to strictly judicial powers.**—With respect to judicial powers, strictly speaking, that is, powers exercised by a judge in the course of regular judicial proceedings, it has been held, not only that a judge cannot delegate his power to another, but that a person cannot be thus authorized to act as a judge, by the agreement of the parties, except in a case where special provision to that effect is made by statute; and the rule applies to a justice of the peace, or a judge of any other inferior tribunal, as well as to a judge of a court of record.³ This rule has been even extended to a case, where the act authorized by the judge, although it related to judicial business, was purely of a ministerial character, as it did not involve the exercise of any discretion or judgment, on the part of the person empowered to act; as where a judge, being absent from the place of holding court, telegraphed to the clerk to discharge a jury, and, the clerk having done so, it was held that this was error and the prisoner must be discharged.⁴

¹ *Ante*, §§ 533-541.

² *Powell v Tuttle*, 3 N. Y. 396.

³ *Wright v Boon*, 2 Greene (Iowa) 458;
Smith v Frisbie, 7 Iowa 486;
Morrow v State, 5 Kan. 563;
Jacquemine v State, 48 Miss. 280;

Borrodalle v Leek, 9 Barb. (N. Y.) 611;
Darling v Gill, *Wright* (Ohio) 73;
Ex parte Kellogg, 6 Vt. 509;
Van Slyke v Trempealeau, etc., Ins.,
Comp'y, 39 Wis. 390.

⁴ *State v Jefferson*, 66 N. C. 309.

§ 572. **Quasi judicial powers ; mayor ; effect of ratification, etc.**—The rule extends also to cases where the power is of a *quasi* judicial character, as stated in the last preceding chapter, that is, wherever it involves the exercise of judgment or discretion. Such a power cannot be delegated to another.¹ Thus, where the charter of a city made it the duty of the mayor to examine and pass upon the ordinances and resolutions of the common council, before they should take effect, it was held, that where that power was delegated by him to a subordinate, an ordinance approved in his name by the latter did not take effect; but it was also held that the mayor's subsequent personal approval would validate it; and that, although the publication of an advertisement for the work was begun, before his personal approval, the proceedings were not vitiated by that fact; but that it was an irregularity only.² But a statute, permitting municipal authorities to appoint commissioners to procure land necessary to be taken for streets, by purchase or condemnation for public use, subject to the approval of the council, is not unconstitutional, as delegating to individuals the power to perform municipal functions.³

§ 573. **As to common council ; board of health ; other officers.**—So, the common council of a city cannot devolve upon a city officer the performance of duties, which the law casts upon the council itself. Thus, where the charter of a city requires certain work to be done by contract, or otherwise, as the common council shall determine; or that, if the expense of the work exceeds a certain sum, it

¹ *Abrams v Ervin*, 9 Iowa 87 ;
State v Shaw, 64 Me. 263 ;
Sheehan v Gleeson, 46 Mo. 100 ;
State v Paterson, 34 N. J. L. 163 ;
Crocker v Crane, 21 Wend. (N. Y.) 211,
 cited *ante*, § 535.
 Nor can the legislature delegate to a

municipality a power, which the constitution forbids the legislature to exercise.

Farrell v Sacramento, 85 Cal. 408.

² *Lyth v Buffalo*, 48 Hun (N. Y.) 175.

³ *Davies v Los Angeles*, 86 Cal. 37.

shall be done by contract, unless the common council shall otherwise determine; an ordinance, directing the work to be done by the street commissioner, or other officer of the city, in such manner as he shall determine, is unauthorized, and an assessment for work so done cannot be collected. The court said: "This is eminently a discretionary power, which cannot be delegated. It is their judgment which the law requires, and not that of any officer they may designate. There is no provision in the law itself, authorizing them to delegate this power; and the case falls within the settled principle, that powers of this description, involving the exercise of judgment and discretion, cannot be delegated; a principle which applies to public bodies and officers, as well as to private individuals."¹ Nor can the common council of a city confer upon a committee of its members a power, vested in the council, to accept a bid or award a contract for grading a street.² So, a board of health cannot delegate to a committee its power to employ a physician.³ So, the power of the trustees of the Brooklyn bridge, to appoint policemen, cannot be delegated to one of their officers.⁴ Other cases, establishing the same rule, upon similar states of facts, and applicable to various public bodies, are cited in the note.⁵ But, although a board of

¹ *In re Emigrant Industrial Savings Bank*, 75 N. Y. 388, per Rapallo, J., 393.

Accord, *Thompson v Schermerhorn*, 6 N. Y. 92;

Birdsall v Clark, 73 N. Y. 73;

Phelps v Mayor, etc., 112 N. Y. 216.

See also, *Richardson v Heydenfeldt*, 46 Cal. 68;

Thomson v Boonville, 61 Mo. 282;

Matthews v Alexandria, 68 Mo. 115.

² *Stockton v Creanor*, 45 Cal. 643.

³ *Young v Blackhawk County*, 66 Iowa 460.

⁴ *Hannon v Agnew*, 96 N. Y. 439.

⁵ *Supervisors v Brush*, 77 Ill. 59;

State v Hauser, 63 Ind. 155;

Indianapolis v Indianapolis Gaslight, etc., Comp'y, 66 Ind. 396, at p. 403;

Franke v Paducah Water, etc., Comp'y, 88 Ky. 467;

Gale v Kalamazoo, 23 Mich. 344;

Maxwell v Bay City B. Comp'y, 41 Mich. 453;

Darling v St. Paul, 19 Minn. 389;

Ruggles v Collier, 43 Mo. 353;

State v Paterson, 34 N. J. L. 163;

State v Fiske, 9 R. I. 94;

Lauenstein v Fond du Lac, 28 Wis. 336;

Lord v Oconto, 47 Wis. 336.

supervisors, as far as it exercises governmental functions, for instance, in the imposition of a tax, can only act as a board, it may, as a business corporation, delegate its "mechanical and physical work" to its agents.¹ And where the common council of a city, empowered to regulate certain trades, and fix fees for licenses therefor, fixed the fees, and empowered the mayor to grant the licenses; it was held that this was not an unlawful delegation of power, and that a license, issued by direction of the mayor, and signed by the city clerk, was valid.²

§ 574. **Prosecuting attorney cannot transfer his authority.**—The same principle was applied, where an action was brought by a lawyer, to recover compensation for services rendered to the defendant, the prosecuting attorney of a county, upon an employment of the plaintiff by the defendant to prosecute certain criminal causes, in which the defendant declined to act. The court held that the plaintiff could not recover, on the ground that the agreement was unlawful. Campbell, J., delivering the opinion of the court, said: "No doubt a prosecuting attorney may employ assistants in various ways, not involving his official discretion or responsibility. . . But the law has very carefully guarded the criminal interests of the state, from any interested or unauthorized intermeddling. The prosecuting attorney is a very responsible officer, selected by the people, and vested with personal discretion, intrusted to him as a minister of justice, and not as a mere legal attorney. . . . This discretion is official and personal; and our laws have only allowed its delegation on special grounds, where an assistant has been provided for by carefully guarded legislation. It is directly contrary to public policy, to allow any general delegation of a prosecutor's powers, and the courts cannot

¹ *People v Supervisors*, 52 Hun (N. Y.) 446. ² *Bradley v Rochester*, 54 Hun (N. Y.) 140.

recognize any such arrangement, as forming a basis for personal compensation.”¹

§ 575. **Authorities as to power in this regard, of deputy sheriffs.**—So the familiar maxim, *delegata potestas non potest delegari*, will prevent a deputy from delegating his own power to another. “Regularly, a deputy cannot make a deputy, because it implies an assignment of his whole power, which he cannot assign over.”² So, a sheriff cannot delegate to another the power to appoint a deputy sheriff; nor can he ratify the illegal act of a person so appointed.³ But if a deputy sheriff empowers his clerk to sign, in the sheriff’s name, a certificate which the deputy may lawfully so execute, and the deputy takes the certificate and uses it officially, it is adopted by him, and becomes to all intents and purposes his own act.⁴ And a deputy sheriff may appoint a bailiff, to do a particular act, as to summon jurors, although he has no power to appoint a bailiff to do the general business of the office.⁵

§ 576. **The same subject; closing gates of state dam.**—A person, employed by a state officer, not authorized to appoint a deputy, is a mere servant, and his acts do not bind the state.⁶ The rule, against delegation of an officer’s power, does not apply to the act of the superintendent of public works, authorizing a person to close the gates of a dam, where the state had appropriated the right to maintain the dam, and to detain the water held back by the gates.⁷

¹ *Engle v Chipman*, 51 Mich. 524.

² Bac. Abr., tit. Offices and Officers, L.

³ *Perkins v Reed*, 14 Ala. 536.

⁴ *Gibson v National Park Bank*, 98 N. Y.

87, aff’g 49 N. Y. Super. Ct. 429. See per Ruger, Ch. J., p. 96.

⁵ *McGuffie v State*, 17 Ga. 497.

⁶ *State v Buffalo*, 2 Hill (N. Y.) 434.

⁷ *Wright v Eldred*, 46 Hun (N. Y.) 12.

II. Appointment of a deputy; validity and effect of agreement, between him and his principal, upon such appointment; tenure of his office.

§ 577. **Deputy may be appointed by parol.**—Many deputies are statutory officers, whose appointment, official tenure, powers, and duties, are regulated by statutory provisions, and whose compensation is fixed by law or municipal ordinance, and paid out of the public treasury. With these we have no concern now. At common law, a sheriff may appoint a deputy by parol, and one so appointed may execute a deed in his principal's name.¹

§ 578. **English rule as to bargains upon appointments.**—With respect to bargains for a deputation, it has been held in England, that under the statute 5 and 6 Edw. VI, against the sale of offices, where the office was within the statute, and the salary certain, if the principal made a deputation, reserving a lesser sum, it was good. So, if the profits were uncertain, arising from fees, if a certain sum was reserved out of the fees and profits, that was good; for the deputy was not to pay, unless the fees amounted to enough; but where the reservation or agreement was not out of profits, but generally to pay a certain sum, that contract was void by the statute.² And that the rule is the same under the statute, 49 Geo. III, ch. 126.³

§ 579. **The American cases as to same subject.**—The courts in the United States have recognized and applied

¹ McGee v Eastis, 3 Stew. (Ala.) 307;
State v Allen, 5 Ired. L. (N. C.) 36.

² Chitty Contr., 9 Eng. ed., 11th Am.
ed., 1014;
Godolphin v Tudor, 2 Salk. 468, aff'd 1
Bro. P. C. 135;
Gulliford v De Cardonell, 2 Salk. 466.

³ Chitty Contr. 1015, citing Aston v
Gwinnell, 3 Younge & J. 136;
Palmer v Bate, 2 Brod. & B., 673; 6
J. B. Moore, 28;
Greville v Attkins, 9 B. & C. 462; 4
Man. & R. 372.
See also, Campbell v Hewlitt, 16 Q. B.
(Ad. & El.) 258.

the same rules, in several cases.¹ They were declared and followed, under a statute of the state of New York, substantially identical with the English statute of 5 and 6 Edw. VI, by the court of chancery, in a case where it was further held, that where the deputy is entitled by law to certain fees or perquisites, in virtue of his character as deputy merely, if he agrees to give the officer appointing him a portion of such fees or perquisites, that is a purchase of the deputation, and both parties are guilty of a violation of the statute against buying and selling offices.² And it was held, in the same state, and under the same statute, that an agreement, upon which an officer appointed the plaintiff his deputy, providing that the plaintiff should perform his duties at a fixed salary, whereas the statute, creating the office, required the officer to pay the deputy a certain proportion of his profits, was void, although it could not be certain, that the stipulated sum would be less than the percentage allowed by law; and that the plaintiff could not recover, either his proportion of the fees, or the unpaid balance of the stipulated salary.³ So, also, it was held in Massachusetts, where the deputies of the sheriff were entitled by law to three fourths of the fees upon writs, etc., executed by them, that a bond from the deputy to the sheriff, to secure to the latter the payment of more than one fourth of such fees, was

¹ *Martin v Royster*, 8 Ark. 74;
Hall v Gavitt, 18 Ind. 390;
State v Peck, 30 La. Ann., Part I, 280;
Pioneer Pr. Comp'y v Sanborn, 3 Minn.
 413;
Meredith v Ladd, 2 N. H. 517;
Carleton v Whitcher, 5 N. H. 196;
Cardigan v Page, 6 N. H. 182;
Tappan v Brown, 9 Wend. (N. Y.) 175;
Mott v Robbins, 1 Hill (N. Y.) 21;
Ferris v Adams, 23 Vt. 186;
Noel v Fisher, 3 Call (Va.) 215;
Addington v Sexton, 17 Wis. 327.

See also, *De Forest v Brainerd*, 2 Day
 (Conn.) 528;
Grant v McLester, 8 Ga. 553;
Salling v McKinney, 1 Leigh (Va.) 42.
 Generally, as to the sale of deputa-
 tions, see *Waldron v Evans*, 1 Dak.
 11;
Stout v Ennis, 23 Kan. 706;
O'Rear v Kiger, 10 Leigh (Va.) 622;
Schloss v Hewlett, 81 Ala. 263.

² *Becker v Ten Eyck*, 6 Paige (N. Y.) 68.

³ *Tappan v Brown*, 9 Wend. (N. Y.) 175.

void.¹ And in another case in New York, the assistant vice chancellor of the first circuit ruled, that a deputy's agreement to serve without salary, if the profits of the office fell short of a fixed sum; and that, if they should exceed it, he should have part of the excess; was legal, and not an evasion of the statute, since the agreement to pay the principal was not absolute, but contingent. ²

§ 580. **Corrupt intent; agreement to appoint deputy made in advance.**—In this class of cases, as in the others, the application of the rule does not depend upon the existence of actual corruption, or even of a reward or gift, received by the promisor. Thus, it was held, that a promise by a sheriff, made in February, to appoint a particular person a deputy sheriff and jailor on the first of April, although not founded upon any reward or benefit to the sheriff, but resting for its consideration solely upon inconvenience and loss to the promisee, was void, on grounds of public policy. The court said: "It is the duty of the officer, having a power of appointment, to make the best appointment in his power, according to his judgment at the time he makes the appointment. The public have a right to demand this. And it is against public policy, that he should be deprived of the exercise of his best judgment, by a contract previously made." ³

§ 581. **When bond of indemnity against deputy's acts void.**—The familiar rule of law, that the courts will not help either party to enforce an illegal contract, or any other contract, founded upon and growing out of the illegal contract, although resting upon a separate consideration, avoids a bond of indemnity, given by the deputy to the principal, to secure him against any injury by the

¹ *Farrar v Barton*, 5 Mass. 395.

See also, *Mattoon v Kidd*, 7 Mass. 33.

² *Stewart v Glentworth*, 1 N. Y. Leg. Obs. 217.

³ *Hager v Catlin*, 18 Hun (N. Y.) 448, per Learned, P. J.

See also, *Jackson City v Bowman*, 39 Miss. 671.

deputy's acts or omissions, where there has been an illegal sale of the deputation.¹ But it has been said, that where the bond is executed, after the contract is past, and the deputy constituted, being no part of the vicious contract, it is as valid as if there had been no sale of the deputation.² Such a bond, where it is not a part of an unlawful contract, is recognized as valid, and is ordinarily taken, wherever the principal officer is liable for the deputy's acts or omissions.³

§ 582. **Term and removal; undersheriff and sheriff's deputies.**—A deputy's commission, in the absence of any statutory provision to the contrary, runs only while the principal's term lasts; if the principal is reëlected or reappointed, the deputy must be appointed anew.⁴ And where the office of sheriff devolves, under the statute, upon the undersheriff, by the death, resignation, or removal of the sheriff, a general deputy of the former sheriff cannot continue to exercise his office, without a new appointment from the undersheriff, upon whom the office has devolved, which must be executed with the formalities required by law, in the case of an original appointment, and a new oath of office must be taken.⁵ A sheriff may remove his deputy at any time, although he has entered into a contract with the deputy, that the latter should hold during his entire term, and the deputy has given full bonds; but it has been said that an action would lie upon the agreement.⁶

¹ *Love v Buckner*, 4 Bibb (Ky.) 506;

Lewis v Knox, 2 Bibb (Ky.) 453;

Davis v Hull, 1 Litt. (Ky.) 9.

See also, *Gray v Hook*, 4 N. Y. 449.

² *Baldwin v Bridges*, 2 J. J. Marsh. (Ky.) 7.

³ See *post*, §§ 594 *et seq.*

⁴ *Greenwood v State*, 17 Ark. 332;

Banner v McMurray, 1 Dev. L. (N. C.) 218

Ante, § 304.

⁵ *Boardman v Halliday*, 10 Paige (N. Y.) 223.

⁶ *Hoge v Trigg*, 4 Munf. (Va.) 150.

As to the latter proposition, *qu.* See *ante*, § 580.

III. Powers of a deputy.

§ 583. **Deputy has all the powers of principal, and they cannot be restricted by agreement.**—It has been said, that a deputy is “one, who occupieth in right of another, and for whom regularly his superior shall answer.” A deputy has not any estate or interest in the office; but he is servant to the officer, and does everything in the name of the officer, and nothing in his own name, and for whom the grantor shall answer (9 Co. 49). But per Holt, Ch. J., it is said that a deputy cannot regularly have less power than his principal; cannot be restrained from exercising any part of the office, by covenant or otherwise; must regularly act in his own name, unless it be in the case of an undersheriff, who acts in the name of the high sheriff, because the writ is directed to him. (*Parker v. Kelt*, 1 Salk. 95.)¹ A deputy has power to do every act, which his principal might do, and cannot be restrained to some particulars of his office, “for that would be repugnant to his being deputy.”² So an arrangement, between a sheriff and his deputy, that the latter shall not serve process from the district court, is of no effect as to the public.³

§ 584. **The same subject; when sheriff is tax collector; county clerk.**—“The authority of the deputy sheriff, to perform all necessary ministerial acts, required in the service and execution of legal process addressed to the sheriff, is unquestionable.”⁴ And where the sheriff is also tax collector, the undersheriff possesses all his powers and duties, with respect to taxes, and his acts bind the sheriff

¹ Bac. Abr., tit. Offices and Officers, L.

² Com. Dig., tit. Officer, D, 3.

³ *Albrecht v Long*, 27 Minn. 81.

⁴ *Gibson v National Park Bank*, 98 N. Y. 87, aff'g 49 N. Y. Super. Ct. 429; per Ruger, Ch. J., p. 96, citing *Livingston v Cheetham*, 2 Johns. (N. Y.) 479;

Jackson v Davis, 18 Johns. (N. Y.) 7.

See also, *Hope v Sawyer*, 14 Ill. 254;

Abrams v Ervin, 9 Iowa 87;

Comm. v Arnold, 3 Litt. (Ky.) 309, at p. 316;

Ellison v Stevenson, 6 T. B. Mon. (Ky.) 271.

and his sureties.¹ So the deputy county clerk may perform all the duties of the county clerk, respecting the collection of the taxes.²

§ 585. **The name in which deputy must act.**—Ordinarily, a deputy must act in the name of his principal, and his acts in his own name are invalid.³ But where a statute empowers a deputy, *eo nomine*, to perform particular acts, he may lawfully act in his own name; and the courts will not disturb a long settled practice in a public office, of using the deputy's name, instead of the principal's.⁴

§ 586. **Effect of statute, authorizing deputy to act during vacancy or absence.**—Where a statutory provision declares, that a deputy shall be clothed with the powers, and subjected to the duties of the principal, during a vacancy in the latter's office, or in case of the latter's absence or inability; if the principal office becomes vacant, the deputy at once becomes the acting officer; his acts are, to all intents and purposes, those of a principal officer, and he is entitled to the salary of the office, while he so continues to act: but in case of the absence or inability of the principal, the powers conferred and the duties imposed upon the deputy are only those, which are necessary for the transaction of the public business, during the principal's temporary disability; and the deputy does not become the acting principal officer, but he acts only as deputy.⁵

¹ *People v Otto*, 77 Cal. 45.

² *Whitford v Lynch*, 10 Kan. 180.

³ *Ante*, § 583;

Lewes v Thompson, 3 Cal. 266;

Joyce v Joyce, 5 Cal. 449;

Rowley v Howard, 23 Cal. 401;

Glencoe v People, 78 Ill. 382;

Evans v Wilder, 7 Mo. 359;

Anderson v Brown, 9 Ohio, 151.

⁴ *Eastman v Curtis*, 4 Vt. 616;

People v Johr, 22 Mich. 461;

Westbrook v Miller, 56 Mich. 148; following *Calender v Olcott*, 1 Mich. 344;

Wheeler v Wilkins, 19 Mich. 78.

See also, *Fells v Barbour*, 58 Mich. 49; *De Villers v Ford*, 2 McCord (S. C.) 144.

⁵ *People v Hopkins*, 55 N. Y. 74, rev'g 1 T. & C. (N. Y.) 195.

§ 587. **Service of process upon principal by deputy, and vice versa.**—There are numerous rulings, many of which depend upon the statutory provisions of the different states, respecting the power of a sheriff or a deputy sheriff to act in a case where the other is interested. These are fully considered in the treatises relating to sheriffs and coroners; and a full examination of these questions is foreign to the plan of this work. It suffices to say here, in general terms, that, unless a statute otherwise provides, a sheriff, although the writ is directed to him, cannot, nor can his deputy, serve a writ upon, or otherwise execute a writ against a deputy sheriff; nor can a deputy sheriff serve a writ upon, or execute a writ against the sheriff, or in a case where the sheriff is a party;¹ and this, although the sheriff or a deputy sheriff is a party as administrator, or otherwise without personal interest.² And it has been held, that where a coroner, who is also deputy sheriff, is sued for neglect of duty as a coroner, the process cannot lawfully be served by another deputy sheriff.³

IV. Liability of the principal officer for his deputy's acts and omissions.

§ 588. **Liable civilly; cases where party has made deputy his agent.**—“Upon the rule of *respondeat superior*, regularly all officers shall answer for their deputies, in the same manner as if the act were done by themselves,

¹ Sewall v Bates, 2 Stew. (Ala.) 462;
Pope v Stout, 1 Stew. (Ala.) 375;
Woods v Gilson, 17 Ill. 218;
Chambers v Thomas, 1 Litt. (Ky.) 268;
Samuel v Comm., 6 T. B. Mon. (Ky.)
173;
Dane v Gilmore, 51 Me. 544;
Ford v Dyer, 26 Miss. 243;
Ingraham v Olcock, 14 N. H. 243;

Barker v Remick, 43 N. H. 235;
May v Walters, 2 McCord (S. C.) 470;
Miller v Yeadon, 3 McCord (S. C.) 11;
Stewart v Magness, 2 Coldw. (Tenn.)
310.

² Johnson v McLaughlin, 9 Ala. 551;
Knott v Jarboe, 1 Met. (Ky.) 504.

³ Brown v Gordon, 1 Me. 165.

unless it be in criminal cases.”¹ “The sheriff is answerable *civiliter* for the acts of his deputies; and it is no objection that the act is of a criminal nature, for which the deputy might be answerable *criminaliter*.”² The rule, that an officer is answerable for any act or omission of his deputy, subject only to the exceptions hereinafter stated, has been established by very many authorities, some of which are given in the note.³ But where the deputy is a special deputy, nominated by and appointed at the request of the injured person, for a particular service to be performed for his benefit;⁴ or where the injured person has so undertaken to instruct the deputy as to his conduct, that the former has in fact made the deputy his own agent,⁵ he cannot recover against the principal officer.

§ 589. **When not liable civilly for deputy's criminal act.**—Although it was said in the opinion, from which an extract is given the last preceding section, that it is no objection that the act, for which the principal is holden to be liable, was of a criminal nature, it has been held, that where a deputy sheriff killed a prisoner, the sheriff

¹ Bac. Abr., tit. Offices and Officers, L; Accord, Com. Dig., tit. Officer, D 4.

² McIntyre v Trumbull, 7 Johns. (N. Y.) 35.

³ Wood v Farnell, 50 Ala. 546; Forsythe v Ellis, 4 J. J. Marsh. (Ky.) 298;

Whitney v Farrar, 51 Me. 418

Norton v Nye, 56 Me. 211;

Draper v Arnold, 12 Mass. 449;

Mansfield v Sumner, 6 Met. (Mass.) 94;

King v Rice, 12 Cush. (Mass.) 161;

Robinson v Ensign, 6 Gray (Mass.) 300;

First Ward Nat. Bk. v Thomas, 125 Mass. 278;

Blunt v Sheppard, 1 Mo. 219;

Rider v Chick, 59 N. H. 50;

Smith v Judkin, 60 N. H. 127;

Van Schaick v Sigel, 60 How. Pr. (N. Y.) 122;

Ross v Campbell, 19 Hun (N. Y.) 615;

Hazard v Israel, 1 Binn. (Pa.) 240;

Seaver v Pierce, 42 Vt. 325.

See, however, Russell v Lawton, 14 Wis. 202.

⁴ Skinner v Wilson, 61 Miss. 90.

⁵ Armstrong v Garrow, 6 Cow. (N. Y.) 465;

Mickles v Hart, 1 Denio (N. Y.) 548;

Sheldon v Payne, 7 N. Y. 453.

See also, Odom v Gill, 59 Ga. 180;

Smith v Berry, 37 Me. 298;

Stevens v Colby, 46 N. H. 163;

Eastman v Judkins, 59 N. H. 576;

Acker v Ledyard, 8 Barb. (N. Y.) 514;

was not liable, under a statute, giving a civil action to the executor or administrator of a deceased person, against one who caused his death by a wrongful act.¹

§ 590. **Party injured by official act has remedy against principal only.**—Where a deputy sheriff fails to pay over money collected by him, the judgment creditor's remedy is by action upon the official bond of the sheriff; which is holden for the acts or omissions of the deputy, although it does not contain an express condition to that effect; for the act or omission of the deputy is the act or omission of the sheriff.²

§ 591. **Deputy's unofficial acts; instances; ratification by principal.**—An officer is not liable for an unofficial act of his deputy. Thus, it has been held by the supreme court of New York, that although a statute requires every distress to "be made by the sheriff or one of his deputies, or by a constable or marshal of the city or town," yet in making a distress for rent, which, at common law, might be made by the landlord in person, or by any one empowered by him to make it, the officer acts as the private bailiff of the landlord; so that, if he is sued for the distress, he must go back of his warrant, and prove the demise and the rent due; and that, if the distress is made by a deputy sheriff, the sheriff is not responsible for his acts, and the sheriff and the deputy cannot be sued jointly therefor.³ So it has been held that a sheriff is not liable for the unofficial act of his deputy, although the latter believed it to be within his official power, and the sheriff, upon being informed thereof, approved it and acted upon it, in the same erroneous belief.⁴ Thus, a

¹ *Hendrick v Walton*, 69 Tex. 192.

² *Crawford v Howard*, 9 Ga. 314;
Brayton v Town, 12 Iowa 346;
State v Moore, 19 Mo. 369.

³ *Moulton v Norton*, 5 Barb. (N. Y.) 286,
 following *Webber v Shearman*, 6 Hill

(N. Y.) 20; and disapproving dictum
 of Bronson, J., in *Van Rensselaer v*
Quackenboss, 17 Wend. (N. Y.) 34.

⁴ *Dorr v Mickley*, 16 Minn. 20.

See also, *Harrington v Fuller*, 18 Me.
 277;

sheriff is not liable to the purchaser at a sale under an execution, for his deputy's representations, respecting the title to the property sold.¹ For further instances of the application of this rule, the reader is referred to the many treatises upon sheriffs and coroners.

§ 592. **Public officer not responsible for default of subordinate.**—The rule is now well settled, by numerous adjudications, “that public officers and agents are not responsible for the misfeasances, or positive wrongs, or for the nonfeasances, or negligences, or omissions of duty of the sub-agents, or servants, or other persons, properly employed by and under them, in the discharge of their official duties.”² And the rule applies, not only to the heads of departments, as the postmaster-general, who, as it has been often held, is not liable for any act or omission of a deputy postmaster; but to the deputy postmasters, and all other subordinate officers, acting under the head of a department, who are compelled to employ sub-agents, clerks, and servants, in the public service; and “to other public officers and agents, engaged in the public service, or acting for public objects, whether their appointments emanate from particular public bodies, or are derived from general laws, and whether those objects are of a local or general nature.” The reason for this rule was thus stated, in a case in the supreme court of the United States, holding, that the collector of customs of the port of New York was not liable for the tort of his subordinate, with respect to the examination of a passenger's trunk: “Competent persons could not be found, to fill positions of the kind, if they knew they would be held liable for all the torts and wrongs, committed by a large body of subordinates, in the discharge of duties, which it would

Knowlton v Bartlett, 1 Pick. (Mass.)

271;

State v Moore, 19 Mo. 369;

Welldes v Edsell, 2 McL. (U. S.) 366.

¹ Lewark v Carter, 117 Ind. 206.

² Story on Agency, 9th ed., § 319;

Story on Bailments, 9th ed., §§ 461, 462; and cases cited.

be utterly impossible for the superior officer to discharge in person.”¹ The only recognized exceptions to this rule are, where the injury was indirectly attributable to the chief officer’s own fault; as where he appointed or retained improper persons as his subordinates, or so negligently managed the affairs of his office, as to furnish an opportunity for the injury, or where he coöperated in the wrongful act.² But it has also been held, that the rule extends only to cases, where the person employed by the principal officer is an officer recognized by the law; otherwise he is the mere servant of the principal officer, who is responsible for his acts.³

§ 593. **Liability of municipal corporations for officers’ acts, etc.**—The same rule has been applied to the officers of a municipal corporation, where their duties are specified by statute, or by ordinance made pursuant to a statute, although they are appointed by the corporation, if the corporation has no power to remove them at pleasure. “If the act of the officer or subordinate of the officer thus appointed, is done in the attempted performance of a duty, laid by the law upon him, and not upon the municipality, then the municipality is not liable for

¹ *Robertson v Sichel*, 127 U. S. 507, per Blatchford, J., p. 515.

² *Story on Agency*, 9th ed., §§ 319 *a* to 321. See also, 2 *Kent’s Comment.*, 610; *Rowning v Goodchild*, 8 Wils. 443; 2 W. Blackst. 906; *Stock v Harris*, 5 Burr. 2709; *Whitfield v Le Despencer* (Lord), 2 Cowp. 754; *Lane v Cotton*, 1 Salk. 17; 1 *Ld. Ray.* 646; 12 *Mod.* 472; *Maxwell v McIlvoy*, 2 *Bibb* (Ky.) 211; *Bishop v Williamson*, 11 *Me.* 495; *Keenan v Southworth*, 110 *Mass.* 474; *Foster v Metts*, 55 *Miss.* 77; *Hutchins v Brackett*, 22 *N. H.* 252;

Wiggins v Hathaway, 6 *Barb.* (N. Y.) 632;

Conwell v Voorhees, 13 *Ohio* 523; *Ford v Parker*, 4 *Ohio St.* 576; *Schroyer v Lynch*, 8 *Watts* (Pa.) 453; *Bolan v Williamson*, 1 *Brev. (S. C.)* 181; 2 *Bay* (S. C.) 551; *Dunlop v Munroe*, 7 *Cranch* (U. S.) 242; *Brissac v Lawrence*, 2 *Blatchf.* (U. S.) 121; *Booth v Lloyd*, 33 *Fed. R.* (U. S.) 593; *Robertson v Sichel*, 127 U. S. 507; *Tracy v Cloyd*, 10 *W. Va.* 19.

Ely v Parsons, 55 *Conn.* 83; *Foster v Metts*, 55 *Miss.* 77.

his negligence therein.”¹ And it has been held, that in the absence of a statute creating a liability, a municipal corporation is not liable for its officer’s act or omission, where he discharges a duty, performed purely for the public service and the general welfare, and not for the local or corporate advantage of the municipality.² But the municipality is liable for its officer’s negligence or want of skill, where the duty is performed for its local or corporate advantage.³ With respect to counties, and also townships, school districts, road districts, and the like, which are only *quasi* corporations, the prevailing rule, as deduced from the modern cases, is that they are not liable for their officers’ acts or omissions, unless they are made liable by statute; for they are political subdivisions of the state, and thus exempt, as is the state, from private actions.⁴ For a fuller examination of this subject, which often presents nice and difficult questions, the reader is

¹ *Maximilian v Mayor, etc.*, 62 N. Y. 160, aff’g 2 Hun (N. Y.) 263; per Folger, J., p. 164, citing *Martin v Mayor, etc.*, 1 Hill (N. Y.) 545;

Russell v Mayor, etc., 2 Denio (N. Y.) 461;

Lorillard v Monroe, 11 N. Y. 392;

Bank of Comm. v Mayor, etc., 43 N. Y. 184.

See also, *Hafford v New Bedford*, 16 Gray (Mass.) 297;

Walcott v Swampscott, 1 Allen (Mass.) 101;

Buttrick v Lowell, 1 Allen (Mass.) 172;

Barney v Lowell, 98 Mass. 570;

Fisher v Boston, 104 Mass. 87;

Haskell v New Bedford, 108 Mass. 208;

Dunbar v Boston, 112 Mass. 75;

McCarthy v Boston, 135 Mass. 197;

Prince v Lynn, 149 Mass. 193;

Detroit v Blackeby, 21 Mich. 84, at p. 113;

Dannat v Mayor, etc., 6 Hun (N. Y.) 88;

McKay v Buffalo, 9 Hun (N. Y.) 401;

Caspary v Portland, 19 Oreg. 496.

See also, *ante*, §§ 514, 551.

² *Curran v Boston*, 151 Mass. 505.

See also, *Tindley v Salem*, 137 Mass. 171; *Dillon Mun. Corp.*, 4th ed., § 974 (*772), and cases cited;

Atwater v Trustees, 124 N. Y. 602, aff’g 56 Hun (N. Y.) 293.

³ *Dillon Mun. Corp.*, 4th ed., §§ 968 (*766), 980 (*778), and cases cited.

See also, *Sullivan v Holyoke*, 135 Mass. 273;

Hill v Boston, 122 Mass. 344;

Appleton v Water Com’rs, 2 Hill (N. Y.) 432;

New York & Brooklyn S. M. & L. Comp’y v Brooklyn, 71 N. Y. 580, aff’g 8 Hun (N. Y.) 87;

Ehrgott v Mayor, etc., 96 N. Y. 264;

Asbestine, etc. Comp’y v Hepp, 39 Fed. R. (U. S.) 324.

⁴ *Dillon Mun. Corp.*, 4th ed., § 963;

Soper v Henry Co., 26 Iowa 264;

Hamilton Co. v Mighels, 7 Ohio St. 109;

Fry v Albemarle Co., 86 Va. 195.

referred to the numerous excellent treatises upon agency and municipal corporations, wherein it is fully discussed and illustrated.

V. Deputy's bond of indemnity to his principal, and liability of the sureties therein

§ 594. **General subject considered in chapter XII.**—The subject of the liabilities of the sureties in an official bond was extensively treated in a former chapter.¹ A few of the cases therein cited relate particularly to the species of bonds now under consideration,² although the general subject of inquiry was the liabilities of sureties in the bonds of principal officers. But some of the rulings and doctrines therein stated, are important to be considered, in connection with this examination; not only because questions, which arise upon the bonds of deputies, are often closely analogous to those which arise upon the official bonds of principals, but also because the liability of the deputy and his sureties, to the principal, generally depends upon the liability of the principal and his sureties, to the public authorities, or to a private person entitled to enforce the principal's official bond.

§ 595. **The form of the bond.**—Where a statute prescribes the species of bond, which an officer may require from his subordinate, a bond, with a condition essentially different from that prescribed by the statute, or which is not allowed by the statute, is void.³ But where a statute does not prescribe the bond which a principal may take, he may require any reasonable bond or other security, for his protection against the acts or omissions of his deputy, as a condition of the latter's appointment.

¹ *Ante*, ch. 12.

² *Ante*, §§ 207, 268, 274.

³ *United States v Tingey*, 5 Pet. (U. S.) 115, per Story, J.;

United States v Humason, 6 Sawyer (U. S.) 199;

United States v Mynderse, 11 Blatchf. (U. S.) 1.

§ 596. **The same subject and cases.**—Thus, the supreme court of North Carolina, in an action by a sheriff upon his deputy's bond, said: "The defendants insist that their bond shall be interpreted by the rules, which govern the construction of the official bonds of a high sheriff, drawn in pursuance of the statute, specifying what bonds shall be given, and the conditions of the same. But there is a wide difference between them, in almost every respect. The one is an official bond of a public officer, the form and conditions of which are fixed by law; the other is the private bond of an individual, for which no form is prescribed, and in which any conditions may be inserted, which will carry out the intents of the parties. . . . The high sheriff appoints his deputies, and is responsible for their action. He appoints them generally or specially, with or without bond, as he sees fit; and if he takes a bond, it is a matter between him and his deputy, with which the public has no concern."¹ So, it has been held, that a bond, given by a deputy sheriff and his surety to the sheriff, upon the appointment of the deputy, to save the sheriff harmless from liability on account of the deputy's conduct, and to pay over to the sheriff one half of the fees arising from business done by the deputy, is not within the statute against the taking of bonds *colore officii*, or within the statute against selling offices, and is a valid and lawful bond;² and that where there is no statutory provision, fixing the terms and conditions of the bond, it may be made as the parties shall agree;³ and this, although it was held, in one case, that such a bond is an official bond.⁴

§ 597. **As to past and future defaults.**—A bond given by a deputy sheriff to the sheriff, to indemnify him

¹ Mullen v Whitmore, 74 N. C. 477.

Lucas v Shepherd, 16 Ind. 368.

² Mott v Robbins, 1 Hill (N. Y.) 21.

⁴ Hubert v Mendheim, 64 Cal. 213.

³ Gradle v Hoffman, 105 Ill. 147;

against any default of the deputy, which was dated, executed by the surety, and handed to the deputy for delivery, several days before the expiration of a term, which the deputy was serving, and was delivered to the sheriff on the first day of a new term; is not, as matter of law, confined to a default occurring during the second term; the question of intention is one of fact. But where the words of the condition fairly imply, that the intention of the bond is to secure the sheriff against future defaults, the surety is not liable for those which have already occurred.¹ The principles upon which the solution of this question depends, are evidently those which govern the liability of the sureties of a principal officer, for acts and omissions, which occurred before his official bond was given, which have been considered in a former chapter.²

§ 598. **As to liability of deputy and sureties generally; expenses of suit.**—In general, the liability of the deputy and his sureties, with respect to the condition in the bond, to indemnify the principal against the acts or omissions of the deputy, or generally, for faithful performance of the deputy's official duties, is coextensive with that of the principal to the public authorities or to a third person. Thus, it has been held, that the sheriff and his sureties are liable for wrongful acts of either the sheriff or his deputy, done *colore officii*; and so that the deputy's sureties are liable to the sheriff, for such acts done by the deputy.³ But there are some exceptions to the rule, that the two liabilities are coextensive. There are cases where, although the principal is not liable to a third person, upon an allegation of a breach of official duty, in the course of official business transacted by the deputy, yet he is

¹ *Thomas v Bleakie*, 136 Mass. 568;
Thomas v Blake, 126 Mass. 320.

² *Ante*, § 204, *et seq.*

³ *Lucas v Locke*, 11 W. Va. 81.

As to the liability of the principal's sureties for such acts, see *ante*, §§ 238-241.

entitled to maintain an action on the deputy's bond to recover his expenses, and other damages which he has sustained, in defending himself against an attempt to hold him liable therefor. Thus, in a case in the supreme court of Maine, the court, after saying that a sheriff has a right to indemnity upon his deputy's bond for all acts and omissions in his official character, continued: "This right of indemnity does not depend upon the success of a suit against the sheriff, for the doings, wrong doings, or neglects of the deputy, or the right to maintain an action therefor; provided he is called upon to defend a suit, instituted on account of his deputy's official doings or omissions. There may be numerous instances, where the sheriff may be called upon in a suit for the alleged default of his deputy, and such action may fail, as having no valid foundation in law or fact, and he may have a perfect claim upon the deputy and his sureties for his expenses in the defence of the action, because those expenses accrued by reason of the doings, wrong doings, or neglects of the deputy, in the execution of some of the conditions of the bond. . . . The sheriff cannot be holden for the breach of a contract, made by his deputy in his private, and not official capacity, although the contract may arise on account of some duty done by the deputy in his office; consequently, he has no claim upon his deputy's bond, for the expense to which he may be subjected in the defence of the groundless suit; for the deputy alone is liable for the failure to fulfil his private obligation." It was then said, that the deputy's bond is holden for the defence of an action by a third person against the sheriff, alleging a levy upon his goods by the deputy, under an execution against another, "whether well founded or not, successful or otherwise." "But," continued the court, "the contracts, which the deputy may make with his servants or agents, for the safekeeping and restora-

tion of that property, are not official acts; and for a breach of those contracts, the sheriff is in no respect holden, and he has no claim upon the deputy for any costs, damages, or expenses arising from the defence of the suit.”¹

§ 599. **Contribution and consent of principal to the misconduct.**—Another exception to the general rule, that the principal’s liabilities, and those of the deputy’s sureties, are coextensive, arises where, notwithstanding the deputy’s misconduct, the principal himself has done or omitted to do some act, by reason of which the consequences of the misconduct, which would otherwise have been avoided, have become irremediable. Thus, where a deputy sheriff received from the sheriff an execution against the body of a judgment debtor, and returned the same to the sheriff, with a false statement that the debtor could not be found, whereupon the sheriff returned the execution “not found;” and after the false return, and before any action had been brought therefor, the judgment debtor was surrendered by his bail to, and taken into custody by the sheriff; but before the bail could take the necessary proceedings to exonerate themselves from liability on the bail bond, the sheriff wrongfully discharged the prisoner, in consequence of which they were compelled to pay the judgment, and thereupon recovered against the sheriff; whereupon he brought an action upon the deputy’s bond; it was held that he could not recover. The court said: “The fault of the deputy in not making the arrest having been remedied by the surrender, and the damages, sustained by the sheriff, having been occasioned by his own subsequent wrongful act in discharging his prisoner, he should not be permitted to fall back upon the original fault of the deputy, for the purpose of rendering him and his sureties liable for those damages.”² So, if an officer consents to the use in the deputy’s

¹ *Smith v Berry*, 37 Me. 298.

Walter v Middleton, 68 N. Y. 605.

business, of public money in the deputy's hands, the sureties of the deputy are discharged from any liability to the officer, for the loss of the money so used.¹

§ 600. **Paying execution afterwards collected; certain matters no defence.**—It is no defence to an action, against the sureties in the bond of a deputy sheriff to the sheriff, that before the default, he became insolvent, and the sureties requested the sheriff to remove him, which the sheriff failed to do.² A sheriff, who has taken a bond from his deputy, conditioned for the faithful performance of his duties, is not bound to notify the sureties in the bond of the deputy's default, before suing on the bond; and evidence of the deputy's ability to pay, when the default occurred, and of his afterwards fleeing the state, is not admissible for the defendants, in an action on the bond. And where the sheriff pays to the judgment creditor the amount of an execution in his deputy's hands, and the deputy afterwards collects the execution, his sureties are liable upon his bond to the sheriff, for the amount so collected, since no one but the judgment debtor could object to the collection of the execution, on the ground that the judgment had been paid.³

§ 601. **Bond of deputy to sheriff who is tax collector.**—A sheriff, who is made by law the collector of the taxes in his county, may recover, for the deputy's default with respect to the taxes, against the sureties in a bond given by his deputy, and conditioned for faithful performance of his duty as deputy sheriff.⁴

¹ *Pickering v Day*, 3 Houst. (Del.) 474.

² *McGehee v Gewin*, 25 Ala. 176.

³ *Andrus v Bealls*, 9 Cow. (N. Y.) 693;
Barnard v Darling, 11 Wend. (N. Y.) 28.
 See also, *Crane v Newell*, 2 Pick. (Mass.)
 612; and for analogous cases respect-
 ing an official bond, *ante*, §§ 283, *et seq.*

⁴ *Wood v Cook*, 31 Ill. 271;
Mullen v Whitmore, 74 N. C. 477.

See also, *Jarnagin v Atkinson*, 4
Humph. (Tenn.) 470.

CHAPTER XXV

EXERCISE OF POWER, GRANTED TO TWO OR MORE OFFICERS,
WHERE ONE OR MORE VACANCIES EXIST

CONTENTS

- SEC. 602. General subject of exercise of power, granted to two or more, considered at length in chapter 8; principal propositions there established.
603. English rule, that if an office is granted to two, and one dies, the office is determined.
604. American rule, stated generally, that the power survives, in case of death, disqualification, etc., of some of those empowered.
605. The same; but where the context of the statute shows that it was to be exercised by all, it does not survive.
606. Where the power is conferred upon two, or two only survive, it must be executed by both.

§ 602. Questions considered in chapter 8; propositions there established.—In a former chapter,¹ while considering the subject of the exercise of a power of appointment to a public office, conferred, by a constitutional or statutory provision, upon two or more officers or bodies of officers, it became necessary, in order to fully elucidate the subject then under examination, to state the rules, relating to the exercise of all powers of a public nature thus conferred, and to cite the numerous authorities establishing such rules. It was there shown, that although in matters of private concern, it is necessary, in order to validate the exercise of a power conferred upon several, that all should unite in the act, yet in matters of public concern, requiring the exercise of judgment and discretion, it suffices that all the persons

¹ *Ante*, ch. 8.

empowered shall meet for consultation; and upon such a meeting, the power may be exercised by a majority of the entire body;¹ that the English authorities have established an exception to the rule, with respect to the acts of corporations, including municipal corporations, to the effect that it is not necessary that all the members of the body authorized to act should meet for consultation; it suffices that notice of the meeting be given to all, and thereupon a majority of the whole body may act, notwithstanding the absence of the minority;² and that the same rule had been extended, by many of the American authorities, to the acts of all public officers or public bodies.³ The sufficiency of the notice, the rules governing where the power is conferred upon two or more bodies, and various other matters pertaining to the subject, were fully considered in that chapter, to which the reader is now referred. The only matters, remaining to be considered in this chapter, are the rules which govern, where the power is conferred upon two officers, or where a vacancy exists in one or more of the offices, upon the incumbents of which the power was conferred.

§ 603. **English rule as to survivorship.**—The English rule, where one of several officers dies, has been thus stated: “The king granted the office of comptroller of the customs in the port of Exeter *durante bene placito* to two; one died; and the question was whether the other should have the whole by survivorship. *Et per cur.*: he shall not; for there shall be no survivorship of an office of trust, if it is not granted to them and the survivor.”⁴ So it has been held, that “if an office be granted to two or more, and one die, the office does not survive, but determines; as if two sheriffs, and one dies, the other

¹ *Ante*, §§ 105-107.

² *Ante*, §§ 112-114.

³ *Ante*, § 111.

⁴ *Bac. Abr.*, tit. Offices and Officers, K, citing *Arris v Stukely*, 2 Mod. 260.

cannot act; otherwise if granted to two and the survivor of them.”¹

§ 604. **American rule.**—The general rules, applicable to this class of cases, are thus stated by a learned American judge, in a case where the question was, whether the act of a public board, consisting of ten officers, was valid, where it was performed at a meeting of nine only, the tenth place having become vacant: “Where, in matters of a private nature, a power is to be exercised by certain designated individuals, all must concur in its exercise; and the death, absence, or inability of any one of them, will not make the execution of the power by the remainder of them valid. But where powers, to be exercised as a continuous public trust or duty, are confided to designated persons, the discharge of the public duty or trust is not to be interrupted or fail, through the death, absence, or inability of any of the persons, to whom the exercise of it is intrusted, provided there is a sufficient number to confer together, deliberate, and, in view of the possibility of division of opinion, to decide upon what course is to be adopted; and if the power or duty is confided only to two persons, and one of them dies or is incapable of discharging it, the other cannot act alone, because there can be no conferring together in such a case. But, where to prevent a failure of justice, it is indispensable that one should act alone, without conferring with the other, he may do so, and the act will be valid. (Citing *Rex v. Warrington*, 1 Salk. 152; *Naylor v. Sharpless*, 2 Mod. 23; *Rich v. Player*, 2 Show, 286; Vin. Ab. Coroner, 7.) If the public duty is intrusted to three, and one dies or is disqualified, I doubt if the others can act alone, as, in the event of a division of opinion, there can be no decision; but if there are more than three remaining, the majority can decide, and if all qualified to act are notified, as

¹ *Jones v Pugh*, 2 Salk. 465.

was the case here, an act, done by the majority of them, is in my judgment valid. In this view, as there were only nine trustees entitled to act, a resolution, in favor of which five voted, was a resolution passed by a majority of the whole body, as it then existed.”¹ And it has been held, by the United States supreme court, that where a power to appoint to an office is conferred upon three officers, and one dies, the other two, the vacancy remaining unfilled, may make the appointment.²

§ 605. **The same.**—So it was held, by the New York court of appeals, where a statute conferred certain powers of a public nature upon five commissioners, designated therein, of whom one afterwards died, and another ceased to be a resident of the state, and there was no provision in the statute for filling a vacancy; that the three remaining commissioners were empowered to act. The court said: “A grant of power, in the nature of a public office, to several, does not become void upon the death or disability of one or more. Such a grant of power is not in the nature of a private franchise, which, when granted to two, without words of survivorship, might not, by the rules of the common law, survive the death of one. But the policy of the law is to guard against the failure of a public service. . . . By death or disqualification of a portion of the commission, the number of its members is reduced; and all do meet, when all who are living and qualified to act come together.”³ Where, however, a public power was granted by statute to

¹ *Gildersleeve v Board of Education*, 17 Abb. Pr. (N. Y.) 201, per Daly, F. J., p. 211.

Approved, *In re Merriam*, 84 N. Y. 596, p. 609.

See also, *People v Harrington*, 63 Cal. 257;

Hartshorn v Schoff, 58 N. H. 197;

Sullivan v Speights, 14 S. C. 358.

² *Oregon v Jennings*, 119 U. S. 74, at p. 90.

³ *People v Palmer*, 52 N. Y. 83, aff'g s. c., *sub nom. People v Bradley*, 64 Barb. (N. Y.) 228.

S. P., *People v Mayor, etc.*, 63 N. Y. 291, rev'g 2 Hun (N. Y.) 433; 5 T. & C. (N. Y.) 61.

three persons, and the statute provided, that whenever the number should be reduced below three, the vacancy should be filled in a particular manner; and, upon consideration of the whole statute, the court thought that it was "quite evident, that the legislature intended to intrust the powers conferred to three persons, and that the judgment of that number should be requisite to the discharge of their duties;" it was held, that where one of them vacated his office, by the acceptance of an incompatible office, the powers of the other two were suspended, until the vacancy was filled.¹ So it has been held, that two assessors of taxes, the third not having qualified, are not authorized to assess a tax, it being evident, upon a consideration of the statute, that the legislature intended that the power should be exercised by the three;² nor can two issue a warrant for the collection of taxes, while the office of the third is vacant.³

§ 606. **Power conferred upon two, or two survivors, executed by both.**—It is well settled, that where the power is conferred upon two persons, or where by death or vacancy a power originally conferred upon a larger number has been devolved upon two only, and they are authorized to act, both must join, in order to validate the execution thereof.⁴ But it has been said that where the authority is of a public nature, in order to prevent a failure of justice, one alone may act, where the other is dead, interested, or absent.⁵ And where the right to sue, appeal, or bring a writ of error is given to two or

¹ *People v Nostrand*, 46 N. Y. 375, at p. 383, as explained in *People v Palmer*, 52 N. Y. 83, at p. 87.

² *Williamsburg v Lord*, 51 Me. 599; *Machiasport v Small*, 77 Me. 109.

³ *Sanfason v Martin*, 55 Me. 110; *Machiasport v Small*, 77 Me. 109.

⁴ *Ex parte Rogers*, 7 Cow. (N. Y.) 526;

Downing v Rugar, 21 Wend. (N. Y.) 178;

Pell v Ulmar, 21 Barb. (N. Y.) 500; *New York Life, etc., Ins. Comp'y v Staats*, 21 Barb. (N. Y.) 570; *Perry v Tynen*, 22 Barb. (N. Y.) 137; *Powell v Tuttle*, 3 N. Y. 396.

⁵ *Downing v Rugar*, 21 Wend. (N. Y.) 178, at p. 183. And see *ante*, § 604.

more public officers, they may depute one of their number to use their names, employ counsel, and do any other act necessary to the regular prosecution of the proceeding.¹

¹ *People v Com'rs of Canal Fund*, 3 Hill
(N. Y.) 599.

(N. Y.) 86, rev'd, on another point, 7
N. Y. 9.

See also, *People v Newell*, 13 Barb.

CHAPTER XXVI

EXERCISE OF POWER BY AN OFFICER INTERESTED

CONTENTS

I. General rule.

SEC. 607. An interested officer is disqualified, where his action is judicial or *quasi* judicial, but not where it is ministerial.

II. Particular cases, wherein an interested officer may not act.

608. Rule that a judge cannot act in his own cause.

609. Exception, where his interest is small, and he is the only judge authorized to act.

610. *Quasi* judicial power; where several exercise it, some cases hold, that interest of one always invalidates.

611. Other cases hold, that such interest invalidates, only where the vote of the interested officer is necessary to complete the transaction; ruling where officer became interested afterwards.

612. Various instances, where exercise of *quasi* judicial functions by an interested officer was held unlawful.

613. Rule applies, although officer interested with another, or acts in the name of another, or completes the transaction after expiration of his term.

III. Particular cases, wherein an officer, although interested, may act.

614. Officer interested not disqualified, if duty purely ministerial; thus clerk may issue an attachment, or enter judgment, in his own favor.

615. Judge of a court may buy property sold under execution; but not property sold under his order, where he is to confirm the sale; when judge may perform formal duties, although he has been counsel, etc.

616. Where lands to be sold for the state, by an officer, at a fixed sum, he may purchase.

617. Rule that officer, acting in matter of public interest, is not disqualified by private interest, where he alone can act; as where officer taking land for public use, assessing taxes, etc., owns land affected.

IV. *Effect of unlawful action by an officer interested.*

SEC. 618. General principles.

- 619. Statute, allowing contract with member of city council to be declared void, at the instance of the city, does not restrict the city to equitable relief; but tax payer cannot have such relief.
- 620. Mayor, taking lease of city park, lease cannot be ratified by council of which he is a member; but he may be allowed improvements: when act is absolutely void, and incapable of ratification; mayor approving officer's bond, in which he is surety, notice to him of invalidity does not charge the city.
- 621. Purchase by officer at tax sale voidable only, and *bona fide* purchaser protected; if sale set aside on application of land owner, lien of tax not discharged, and money forfeited.

I. *General rule.*

§ 607. **Disqualification where action judicial or quasi judicial; aliter where ministerial.**—As shown by the cases, hereafter cited in this chapter, the general rule, respecting the exercise of power by an officer interested, is that he shall not act where the power is judicial, but he may act where it is ministerial. The prohibition to act includes, not only cases where he exercises a strictly judicial power, that is, where he is a judge acting in judicial proceedings, but also cases where the power is of a *quasi* judicial character, as explained in former chapters. Of this character are all powers, the exercise of which involve discretion; or that degree of judgment, which gives them the character of judicial or *quasi* judicial powers; but a power is none the less ministerial, within this rule, because the person exercising it is required to satisfy himself, that the conditions have occurred, wherein he is authorized by law to act, or otherwise to decide as to the mode of its exercise.¹

¹ *Evans v Etheridge*, 96 N. C. 42.See also, *ante*, §§ 533-538.

II. Particular cases, wherein an interested officer may not act.

§ 608. **Judge cannot act in his own cause.**—The class of cases, which first claims our attention, consists of those where a judicial power, strictly so termed, is exercised. The common law merely declares that no man can be judge in his own cause; and at common law consanguinity to either of the parties, although good cause for a challenge to a juror, does not disqualify a judge.¹ The subject of the competency of a judge, to sit in a cause, where he is interested, or related by consanguinity or affinity to a party, has been universally regulated in this country, by statute; and the rulings upon the statutes, and upon the common law rule, have been numerous, and have often involved the solution of difficult questions, and the establishment of nice distinctions. It is not within the plan of this work to consider these questions at length; they belong rather to treatises on jurisdiction and procedure.

§ 609. **Exception; his interest small, and he the only judge authorized to act.**—We must, however, notice here one exception to the common law rule, as it applies also in cases where the power to be exercised is of a *quasi* judicial character. It relates to the case where a judge, although interested, is the only one who can administer justice between the parties. The rulings on this subject were fully reviewed, by a distinguished judge of the court of appeals of New York, who declared his deduction therefrom as follows: “That where a judicial officer has not so direct an interest in the cause or matter, that the result must necessarily affect him, to his personal or pecuniary loss or gain; or where his personal or pecuniary interest is minute, and he has so exclusive jurisdiction

¹ *In re Dodge & Stevenson Manuf. Comp’y*, 77 N. Y. 101, per Rapallo, J., p. 112.

of the cause or matter, by constitution or by statute, as that his refusal to act will prevent any proceeding in it; then he may act, so far as that there may not be a failure of remedy, or, as is sometimes expressed, a failure of justice.”¹

§ 610. **Quasi judicia. power; where several exercise, rulings that interest of one invalidates.**—As was stated in a former chapter, a power, the exercise of which is committed to the judgment or discretion of the officer, is in the nature of a judicial power, and is styled sometimes simply a judicial power, and sometimes a *quasi* judicial power.² Where such a power is committed to several officers, to be exercised jointly by them, the rule has been extended so far, in some cases, that an exercise of power, in which either of them is interested, is deemed void. Thus, it was held, that the employment by the board of health of a city of one of its members, a physician, to vaccinate the pupils in a public school, at a specified sum for each pupil vaccinated, was void, and created no liability against the city. The court said: “The board and its

¹ *In re Ryers*, 72 N. Y. 1, per Folger, J., p. 15; aff'g 10 Hun (N. Y.) 93, and citing
Anon., 1 Salk. 396;
Mayor, etc., v Markwick, 11 Mod. 164;
In re Great Charte, etc., 2 Str. 1, 173;
Dimes v Grand Junction Can. Comp'y, 3 H. of L. Cas. 759;
Ranger v Great West. Railway Comp'y, 5 H. of L. Cas. 72;
The'lusson v Rendlesham, 7 H. of L. Cas. 429;
Day v Savadge, Hobart, 85;
Heydenfeldt v Towns, 27 Ala. 423;
Comm. v Ryan, 5 Mass. 90;
Pearce v Atwood, 13 Mass. 324
Hill v Wells, 6 Pick. (Mass.) 104;
Comm. v Emery, 11 Cush. (Mass.) 406;
Comm. v Burding, 12 Cush. (Mass.) 506;
Hanscomb v Russell, 11 Gray (Mass.) 373;

Peck v Freeholders, etc., 20 N. J. L. 457;
Mooers v White, 6 Johns. Ch. (N. Y.) 360;
Washington Ins. Comp'y v Price, Hopk. (N. Y.) 1;
Ten Eick v Simpson, 11 Paige (N. Y.) 177;
In re Leefe, 2 Barb. Ch. (N. Y.) 39;
Wood v Stoddard, 2 Johns. (N. Y.) 194;
Stuart v Mechs. & Farm. Bk., 19 Johns. (N. Y.) 496;
Wood v Rice, 6 Hill (N. Y.) 58;
People v Sup'rs, 11 N. Y. 563;
Swift v Poughkeepsie, 37 N. Y. 511;
People v Edmonds, 15 Barb. (N. Y.) 529;
Richardson v Boston, 1 Curtis (U. S.) 250;
State v Collins, 5 Wis. 339.
 See also, *post*, § 617.

² *Ante*, § 533.

members held positions of trust and confidence towards the city. Their responsibilities, in reference to the services for which the appellee" (the plaintiff) "claimed compensation, were at once important and delicate. It was for them to decide, whether an emergency had arisen, and what children were entitled to be treated at the public expense. . . . The antagonism between the appellee's private interest and his public duty, it is manifest, was very great, and calculated to cast suspicion upon his discharge of duty, no matter how faithfully and conscientiously it was done. Let it be understood, that such personal advantage may result to a member of the board, and suspicion not only attaches to his selection of those who may be served at public expense, but it extends to and taints the original decision and declaration of the board, that an emergency existed, which required the work to be done." Then, after referring to the rule, that an agent cannot put himself in a position adverse to that of his principal, the court continued: "As agent he cannot contract with himself personally. He cannot buy what he was employed to sell. If employed to procure a service to be done, he cannot hire himself to do it. This doctrine is generally applicable to private agents and trustees, but to public officers it applies with greater force, and sound policy requires that there be no relaxation of its stringency, in any case which comes within its reason."¹ So it has been held, that county commissioners cannot make a contract, with one of their own number, which will bind the county.²

§ 611. **Other cases narrowing the rule.**—But other decisions have narrowed the rule, where several officers act, to the case where the interested officer's vote or presence was necessary to the completion of the trans-

¹ *Fort Wayne v Rosenthal*, 75 Ind. 153.

See also, *Comm. v Douglass*, 1 Binn. (Pa.) 77.

² *Waymire v Powell*, 105 Ind. 328.

action.¹ Thus, the supreme court of Michigan held, that the proceedings to remove an officer of a school district, by the township board, are the nature of a judicial investigation; and if one of the board is interested in the subject of the complaint, and his presence is essential to make a quorum of the board, the removal is void; that every special tribunal, appointed by law, is subject to the maxim, that no person can sit as a judge in a case to which he is a party, or in which he is interested; which principle extends beyond the statute relating to judicial officers, and applies wherever judicial powers are exercised by a body empowered by law.² So, where a power of appointment to office was given to three of the four justices of the peace of a town; and, the four justices having convened for the purpose, three of them voted for one of their own number, and the fourth voted for another, and refused to sign the warrant for the appointment; whereupon the other three, including the person chosen, signed the warrant; it was held, that inasmuch as his vote and his signature were essential to make up the statutory number, the appointment was void.³ Where the commissioners, appointed by the state to perform a public work, entered into a contract with another person respecting the work, and, after the contract had been executed, and while the work was in progress, under the superintendence of the commissioners, one of their number took an interest in the contract; it was held, that the agreement, by which he was let into an interest, was against public policy, and a fraud upon the state, and that it could not be enforced.⁴

§ 612. **Instances where interest held to invalidate quasi judicial functions.**—A clerk of a chancery court,

¹ *San Diego v San Diego, etc.*, R. R. Comp'y, 44 Cal. 106.

See also, *State v Hoyt*, 2 Oreg. 246; and *ante*, § 120.

² *Stockwell v White Lake*, 22 Mich. 341.

⁴ *McGehee v Lindsay*, 6 Ala. 16.

³ *People v Thomas*, 33 Barb. (N. Y.) 287.

who exercises *quasi* judicial functions in many of his official acts, cannot act as agent for a litigant in his court, even if he receives no compensation for his services.¹ A tax collector, county treasurer, or other officer, authorized to sell property for taxes, cannot purchase at his own sale property so sold.² So a sheriff, or other similar officer, selling goods under an execution or attachment, cannot act as agent for either party, except by consent of all the parties.³ The rule, forbidding a sheriff to serve process on his deputy, or *vice versa*, has been stated in a former chapter.⁴ A county auditor, who publishes in a newspaper of which he is the owner, the delinquent tax list, without directions from some other county officer, cannot enforce payment for the service from the county treasurer.⁵ A city judge cannot collect from the city the rent of a court room which he owns.⁶ Other cases, recognizing and applying the same rule, are cited in the note.⁷

§ 613. The same subject; wide scope of the rule.— It is immaterial, for the purpose of the application of the rule, that an indifferent person is associated with the officer in the unlawful transaction. Thus, where an act of parliament forbade any of the officers of a local board of health to be interested in a contract made by the authority of the board, a contract made with such an

¹ *Kirkland v Texas Express Comp'y*, 57 Miss. 316.

² *McLeod v Burkhalter*, 57 Miss. 65.
Accord, *Ellis v Peck*, 45 Iowa, 112;
Haxton v Harris, 19 Kan. 511.

³ *Knight v Herrin*, 48 Me. 533.
 See also, *Jones v Loftin*, 2 Hawks (N. C.) 199;
Chambers v State, 3 Humph. (Tenn.) 237.

⁴ *Ante*, § 587.

⁵ *Stropes v County Com'rs*, 72 Ind. 42.

⁶ *McGregor v Logansport*, 79 Ind. 166.

⁷ *Mayor, etc., v Huff*, 60 Ga. 221;
Pierce v Benjamin, 14 Pick. (Mass.) 356;
Walton v Torrey, Harr. Ch. (Mich.) 259;
Ingerson v Starkweather, Walk. Ch. (Mich.) 346;
Clute v Barron, 2 Mich. 192;
People v Township Board, 11 Mich. 222;
Currie v School Dist., 35 Minn. 163;
Perkins v Thompson, 3 N. H. 144;
Pickett v School Dist., 25 Wis. 551.

officer and another, is unlawful.¹ Nor does it affect the application of the rule, that the officer acts in the name of an indifferent person. Thus, the county surveyor, who is one of the agents of a state for the sale of its swamp lands, cannot lawfully, either receive and file his own application for the purchase of certain lands, and make a survey thereupon, or do the same acts on the nominal application of another, but wholly or partly for his own benefit.² Nor can a deputy surveyor of a land district lawfully contract for the purchase of land in his district, from one, having a certificate to locate such land, although the public dues therefor were paid, after the expiration of his term of office.³

III. Particular cases, wherein an officer may act, although he is interested.

§ 614. **Interest no disqualification where function purely ministerial; instances.**—As already stated, the rule, excluding an interested officer, does not apply to the exercise of a purely ministerial power, with some exceptions, chiefly those relating to cases, where an officer, or his deputy, or his principal, is a party. But even in such a case, if the duty is purely ministerial, the officer is not disqualified. Thus, it has been held, that the clerk of a court may issue an attachment, in a cause wherein he is plaintiff, inasmuch as this is a purely ministerial act.⁴ So, it has been held, that the clerk of a court may enter a judgment by confession in his own favor, partly because no other officer can act, and partly because the act is of a ministerial character.⁵

¹ Melliss v Shirley Local Board, 16 L. R., Q. B. D. 446; 55 L. J. Q. B. 143; 53 L. T. 810; 34 W. R. 187; 50 J. P. 214.

See also, *ante*, § 611.

² Edwards v Estell, 48 Cal. 194

³ Wills v Abbey, 27 Tex. 202.

See, however, People v Force, 100 Ill. 549, cited *post*, § 616.

⁴ Evans v Etheridge, 96 N. C. 42.

⁵ Trimmier v Winsmith, 23 S. C. 449.

§ 615. **The same subject; further instances.**—It has also been held, that the judge of a court, from which an execution is issued, may lawfully purchase property sold under the execution.¹ This ruling was put upon the ground, that he has no judicial authority to exercise respecting the sale. But where a judge orders a sale of land, and has power to confirm or set aside the sale, he cannot become the purchaser.² A circuit judge, who had been counsel in a cause, may execute an order of a higher court, directed to the circuit judge;³ and where both of the judges of a circuit court of the United States have been counsel, or are interested in the cause, they may make an order certifying the cause to another circuit.⁴

§ 616. **The same subject; further instance.**—Where the treasurer of the board of canal commissioners, who was authorized by law to sell certain lands of the state, at the fixed sum of \$1.25 per acre, purchased certain of the lands himself, and executed to himself the proper certificate of sale, paying the price so fixed; it was held, that the sale was valid, or, if any question as to its validity could arise, it had been ratified by the receipt by the state of the price, and by returning the land as subject to taxation, and collecting taxes thereupon. As respects the validity of the sale, the court said: “The price, at which the land could be sold, was fixed by law at \$1.25 per acre; it could not be sold for more nor less than that sum. Whether Campbell” (the treasurer), “or a stranger, became the purchaser of a tract of land, could in no manner affect the state. If the price provided by law was paid, the state could not be injured.”⁵

¹ *Cooper v Galbraith*, 3 Wash. (U. S.) 546.

² *Tracy v Colby*, 55 Cal. 67.

³ *State v Collins*, 5 Wis. 339.

⁴ *Richardson v Boston*, 1 Curtis (U.S.) 250. *People v Force*, 100 Ill. 549.

Compare this case with *Edwards v Estell*, 48 Cal. 194, and *Wills v Abbey*, 27 Tex. 202, cited *ante*, § 613.

§ 617. The doctrine extended; officer acting in a matter of public interest, where he alone can act.—The exception to the rule, forbidding an officer to exercise a judicial or *quasi* judicial power, in a case wherein he is interested, which arises where no other officer has power to act, and consequently his action is necessary to prevent a failure of justice, has already been stated.¹ Partly upon that ground, and partly because the public interest is deemed to be paramount to any private interest, or to any objection to official action, founded upon the existence of a private interest, it has been held, that an officer, charged with the performance of a duty for the benefit of the public, and the performance of which affects the interests of several private persons, is not disqualified from acting, by the fact that he is one of the persons so affected. Thus, a commissioner of highways, although his action is *quasi* judicial, is not a judicial officer, within the statute prohibiting such an officer from acting, where a relative is interested, where his relative is the applicant for the opening or discontinuance of a highway. In such a case, the public is the real party in interest. And this rule extends to assessors, and other *quasi* judicial officers of the same description.² So, the legislature having empowered the board of supervisors to audit the expenses, chargeable upon a party appealing from them to the state board of equalization, the members of the board, in so doing, discharge a duty of public administration, cast upon them by law, and are not within the rule forbidding a judge to sit in his own case.³ So, it has been held, that a commissioner, appointed by a special statute to award damages for land, taken in laying out a highway, is not rendered incompetent by the fact, that he owns land, which has been taken for the improvement. The court

¹ *Ante*, § 609.

³ *People v Kingston Common Council*,
101 N. Y. 82.

² *People v Wheeler*, 21 N. Y. 82.

said, that the maxim that no man shall be judge in his own case "applies to judicial officers, but not to officers whose duties partake of an administrative character, and are only *quasi* judicial. . . . If this objection should prevail, assessors, highway commissioners, tax commissioners, and many other boards of public officers, would be incompetent to act, and it would be impracticable to exercise some of the most important functions of the government. The public interest is supreme. Whenever compatible with this, officers like the one in question should be disinterested."¹ So an assessor of taxes is not disqualified, because his son owns land assessed.² Nor is a county judge disqualified from appointing commissioners, under the general drainage act of New York, because he is the owner of land to be affected by the proceedings.³

IV. Effect of unlawful action, by an officer who is interested.

§ 618. **General principles.**—The general rules, applicable to this subject, as that an unlawful contract or transaction cannot be made the foundation of an action; the rules of equity jurisprudence, respecting relief in equity against unlawful transactions; those respecting the cases where an action will or will not lie, in disaffirmance of an unlawful transaction; and the like, pertain to the general principles of law, applicable to this particular class of cases, only in common with all others presenting the same features. But a few cases, relating specially to the effect of this particular violation of law, may properly find places here

¹ *In re Southern Boulevard*, 3 Abb. Pr. N. S. (N. Y.) 447.
Accord, *Foot v Stiles*, 57 N. Y. 399.

² *O'Reilly v Kingston*, 39 Hun (N. Y.) 285.

³ *In re Ryers*, 72 N. Y. 1, *aff'g* 10 Hun (N. Y.) 93.

§ 619. **Right to avoid illegal contracts of municipal officers.**—Where a statute forbids any member of the common council of a city, to become a contractor, under any contract ordered by the common council, and provides that any contract, in violation of that prohibition, “may be declared void at the instance of the city;” the statute does not have the effect of restricting the city to an equitable action to avoid the contract, and the statutory prohibition may be set up by the city as a defence to an action upon such a contract; inasmuch as the statute is merely declaratory of the common law.¹ But, in the absence of a statute allowing such relief, a mere taxpayer cannot maintain an action to set aside such an illegal contract.²

§ 620. **The same subject; ratification.**—Where the mayor of a city, who was *ex officio* president of the council, contracted with the council to lease the city park for five years, and, for an annual sum to be paid to him, to fence and drain it, and keep it in repair during that time; it was held, that inasmuch as it was his duty as mayor to see that a contractor with the city fulfilled his contract, the contract was illegal; and that, although such a contract might be ratified by a council of which he was not a member, no act of the city, through a council of which he was a member, could operate as such ratification; and no act done or left undone, while he continued to be mayor, could, by deed or acquiescence, have the effect of legalizing the contract: but that, upon a bill in equity by the city, to annul and set aside the contract, the city must do equity, by repaying him the money expended by him in good faith, in fencing, drain-

¹ *Smith v Albany*, 7 Lans. (N. Y.) 14; aff'd 61 N. Y. 444.

² *Roosevelt v Draper*, 23 N. Y. 318, aff'g 7 Abb. Pr. (N. Y.) 108; 16 How. Pr.

(N. Y.) 137. Such a statute now exists in New York, and some other states.

See *Ziegler v Chapin*, 126 N. Y. 342.

ing, etc., the land, of which the city had the benefit.¹ Where a statute made it a misdemeanor, for any councilman to be interested in a contract with the borough, it was held, that an ordinance of the borough, contracting with a water company, adopted when a majority of the councilmen were stockholders in the company, was absolutely void, and for that reason could not be ratified by payments upon the contract, made when none of the councilmen were such stockholders.² Where the statute provided, that the official bond of a city officer might be approved, by either the mayor or the recorder, and the mayor became the surety in the bond of a city officer, and approved the same himself; it was held that he had no power so to do, and that, as he acted without authority, notice to him of a fact, tending to invalidate the bond, was not notice to the city.³

§ 621. **The same subject; purchase by officer at tax sale.**—Under a statute, forbidding a county treasurer or his deputy, from having an interest in land, sold for taxes, where the deputy county treasurer entered a sale of certain lands, as made to a person who was not present, and who subsequently assigned the certificate to him; it was held, that the sale was voidable, not void, and that a subsequent purchaser would be protected, except in a direct proceeding to vacate it.⁴ Under a similar statute, where the county treasurer purchased, it was held that the sale might be set aside, at the instance of the owner; that it did not operate as a payment of the tax, or discharge the lien of the tax upon the land; that the money, paid into the treasury therefor, did not belong to the owner of the land, but belonged to the treasury, and was forfeited to the public.⁵

¹ Mayor, etc., v Huff, 60 Ga. 221.

² Stevenson v Bay City, 28 Mich. 44.

³ Milford v Milford Water Comp'y, 124 Pa. St. 610.

⁴ Ellis v Peck, 45 Iowa 112.

⁵ Haxton v Harris, 19 Kan. 511.

CHAPTER XXVII

EXERCISE OF POWER BY AN OFFICER DE FACTO

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627. The same subject.

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SEC. 630. Such an officer is a good officer *de facto*, and his acts are valid, as to the public and "third persons;" instances, and authorities on the general proposition.

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632. So a judgment, rendered by a justice of the peace, or other official act of any officer, after the expiration of his official term, is valid, without regard to the question whether he lawfully holds over.

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633. The same rule holds in such a case; thus, where a person was appointed, when there was no vacancy, by one whose power extended only to cases of vacancy, his acts are valid; other instances.

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635. A state *de facto* is unknown; but the acts of officers of a state government *de facto* in rebellion are valid; and so are those appointed by the military authorities during war.

(4.) *Where the officer was disqualified from holding the office.*

636. This fact cannot be shown, for the purpose of impeaching the validity of the acts of an officer *de facto*; instances; exceptions.

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637. Where the office is *de jure*, the fact that the incumbent thereof was chosen under an unconstitutional statute, does not prevent him from being an officer *de facto*.

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(6.) *Where the office had been abolished.*

639. An officer *de facto*, presupposes an office *de jure*, and if it has been abolished, there can be no officer *de jure*; if "third person" has notice he is not protected; if township is abolished, there can be no township officer *de facto*.
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665. So sureties in official bond of officer *de facto* liable, as if he was *de jure*.

666. Officer *de facto* cannot be restrained by injunction; but may be compelled to perform by mandamus, as if he was *de jure*. But he may withdraw entirely from the office, and then he is not liable to an individual, or for a statutory penalty for nonfeasance.

667. Where mandamus is brought against officer *de facto*, and officer *de jure* is substituted, proceedings not defeated.

668. Officer *de facto* is liable criminally for misfeasance or malfeasance, as if he was *de jure*; instances.

I. *Who is an officer de jure; who is an officer de facto; general rule governing the exercise of power by an officer de facto.*

§ 622. **General definition; and general rule as to power of officer de facto.**—In examining the numerous, and often difficult questions, which have arisen upon the exercise of the powers of an office by one who is only *de facto* an officer, it is necessary, in the first place, accurately to state what is meant by the expressions “officer *de jure*,” and “officer *de facto*,” and the general rule which governs cases, where an official power has been exercised by an officer *de facto*. Manifestly one, who is in full possession of an office to which he has an unquestioned lawful right, is an officer *de jure* and an officer *de facto*; and even the fact that his right is disputed, if he really has the right, as well as the possession, will not prevent his filling both characters, as well before as after a judicial decision in his favor. There is not, therefore, any necessary repugnancy between the two expressions; but, in the common parlance of the law, they are regarded as designating persons, who have not only distinct but conflicting rights. The precise definitions of these two

classes of officers will presently receive a critical examination, and an extended explanation. In general, it may be said, that where the question arises, as to the validity of the exercise of a particular power, the officer *de jure* is one who, at the time of such exercise had the right to the office, but was kept out of possession thereof, and who has since established his right; while the officer *de facto* is the one, who exercised the power, being then in possession of the office under color of authority, but without actual right thereto. And the general rule is, that the exercise of a power by the officer *de facto*, which lawfully pertained to the office of which he had possession, is valid and binding, where it is for the interest of the public, or of any individual, other than the officer himself, to sustain the officer's act; but where the officer himself founds a right upon such exercise, either personally or officially, it is not valid in his favor. The individuals, whose interests are thus protected, are styled in the books "third persons," which is an inaccurate term, because usually there is no second person concerned in the transaction. This rule will also be considered more at length, and the authorities supporting the same will be cited, in a subsequent portion of this chapter.¹

§ 623. **Distinction between officer de facto and usurper; color of authority and color of title.**—We have said, that in order to constitute a person an officer *de facto*, he must be in possession under some "color of authority;" for this is what distinguishes him from a mere intruder or usurper. The acts of an intruder or usurper are said to be absolutely void.² But color of title is a very different thing from color of authority; for the former expres-

¹ *Post*, § 649.

² *Plymouth v Painter*, 17 Conn. 585;
State v Carroll, 38 Conn. 449;
Hooper v Goodwin, 48 Me. 79;

Tucker v Aiken, 7 N. H. 113;
Hamlin v Kassafer, 15 Oreg. 456;
McCraw v Williams, 33 Gratt. (Va.)
 510; *Sed qu.* See per Devens, J.,
 quoted in § 626, *post*.

sion implies, that the person must be in by virtue of an election or appointment, which is at least colorable. In some cases it has been held, that such an election or appointment is requisite, in order that the exercise of power by an officer *de facto* should be valid; and it has been even said, in some cases, although never actually decided,¹ that it is necessary that such election or appointment should have been made by the only body authorized by law to fill the office.² In a leading case on this subject, which is often quoted in this chapter, the learned chief justice, who delivered the opinion of the court, traced the origin of the doctrine, that color of title is necessary, to an "inaccurate and deceptive report" of an English case, wherein it was said, that "in order to constitute a man an officer *de facto*, there must be at least the form of an election, although that, upon legal grounds, may afterwards fall to the ground,"³ and he showed the fallacy of the doctrine by an examination of the particular case, and the citation of numerous other English and American authorities.*

¹ *State v Carroll*, 38 Conn. 449, per Butler, Ch. J., pp. 464, 465, examining all the cases.

² *Douglass v Wickwire*, 19 Conn. 489;
State v Brennan's Liquors, 25 Conn. 278;
Elliott v Willis, 1 Allen (Mass.) 461;
People v Albertson, 8 How. Pr. (N. Y.) 363.
 Generally, that color of title is requisite to constitute an officer *de facto* within the rule validating his acts. See *Plymouth v Painter*, 17 Conn. 585;
Rice v Comm. 3 Bush (Ky.) 14;
Brown v Lunt, 37 Me. 423;
Hooper v Goodwin, 48 Me. 79;
Fitchburg Railroad Comp'y v Grand Junction, etc., Railroad Comp'y, 1 Allen (Mass.) 552;

Carleton v People, 10 Mich. 250;
People v Collins, 7 Johns. (N. Y.) 549;
McInstry v Tanner, 9 Johns. (N. Y.) 135;
Rochester, etc., R. R. Comp'y v Clarke Nat. Bk., 60 Barb. (N. Y.) 234;
Com'rs v McDaniel, 7 Jones L. (N. C.) 107;
McGargell v Hazleton Coal Comp'y, 4 W. & S. (Pa.) 424;
Gregg v Jamison, 55 Pa. St. 468;
Aulanier v Governor, 1 Tex. 653;
Cocke v Halsey, 16 Pet. (U. S.) 71.

³ *Rex v Lisle*, 2 Strange 1,090; more fully and accurately reported in Andrews 163.

⁴ *State v Carroll*, 38 Conn. 449, per Butler, Ch. J., pp. 463-465.

§ 624. **Rules conflicting with the doctrine that color of title needed.**—The doctrine, that color of title is necessary, in order to constitute an officer *de facto*, seems to be irreconcilable with two well settled rules, namely, *first*, that the title of one, in possession of an office, can be questioned only in a direct proceeding against him for that special purpose, and cannot be questioned collaterally;¹ *secondly*, that evidence that a person was in possession of an office, notoriously acting as such, suffices to show, that at a particular time he was an officer, whenever the question arises collaterally.² The cases, cited in the notes, constitute a portion only of those establishing

¹ *Eaton v Harris*, 42 Ala. 491;
Kaufman v Stone, 25 Ark. 336;
People v Sassovich, 29 Cala. 480;
Plymouth v Painter, 17 Conn. 585;
Douglass v Wickwire, 19 Conn. 489;
Creighton v Piper, 14 Ind. 182;
Gumberts v Adams Express Comp'y,
 28 Ind. 181;
Rogers v Beauchamp, 102 Ind. 33;
Schwartz v Flatboats, 14 La. Ann. 240;
State v Lewis, 22 La. Ann. 33;
Mayor, etc., v Hoffman, 29 La. Ann.
 651;
Fitchburg R. R. Comp'y v Grand Junction R. R. Comp'y, 1 Allen (Mass.) 552;
Sudbury v Heard, 103 Mass. 543;
Brewer v Boston, etc., R. R. Comp'y,
 113 Mass. 52;
Cahill v Kalamazoo M. Ins. Comp'y, 2
 Doug. (Mich.) 124;
Carleton v People, 10 Mich. 250;
Facey v Fuller, 13 Mich. 527;
Ballou v O'Brien, 20 Mich. 304;
Jhons v People, 25 Mich. 499;
Stockle v Silsbee, 41 Mich. 615;
Cooper v Moore, 44 Miss. 386;
Ex parte Parks, 3 Monta. 426;
Morse v Calley, 5 N. H. 222;
Bean v Thompson, 19 N. H. 290;
Hall v Luther, 13 Wend. (N. Y.) 491;
Mayor, etc., v Tucker, 1 Daly (N. Y.) 107;

Crosier v Cornell Steamboat Comp'y,
 27 Hun (N. Y.) 215;
People v Orleans County Court, 28
 Hun (N. Y.) 14;
Culver v Eggers, 63 N. C. 630;
Ex parte Strang, 21 Ohio St. 610;
Hagner v Heyberger, 7 W. & S. (Pa.)
 104;
Comm. v McCombs, 56 Pa. St. 436;
State v Pierpont, 29 Wis. 608.
 Thus title cannot be tried upon mandamus, although the officer is a party. *Rex v Mayor, etc.*, 2 T. R. (D. & E.) 259;
Rex v Banks, 3 Burr. 1,452; 1 W. Black. 445, 452;
Duane v McDonald, 41 Conn. 517;
People v New York, 3 Johns. Cas. (N. Y.) 79;
People v Stevens, 5 Hill (N. Y.) 616.

² *People v Clingan*, 5 Cala. 389;
Bryan v Walton, 14 Ga. 185;
Allen v State, 21 Ga. 217;
Carter v Sympson, 8 B. Mon. (Ky.) 155;
Druse v Wheeler, 22 Mich. 439;
Northwood v Barrington, 9 N. H. 369;
State v Butman, 42 N. H. 490;
Potter v Luther, 3 Johns. (N. Y.) 431;
Wilcox v Smith, 5 Wend. (N. Y.) 231;
Snyder v Schram, 59 How. Pr. (N. Y.)
 404;

these two well known propositions; we shall have occasion to cite others to the same effect, in the next succeeding division of this chapter.

§ 625. **Lord Ellenborough's definition of officer *de facto*.**—The general definition of an officer *de facto*, which is accepted in the modern cases, is that given by Lord Ellenborough, as follows: "One who has the reputation of being an officer he assumes to be, and yet is not a good officer in point of law."¹ And, as a corollary from this definition, it has been held, that "there must be some color of an election or appointment, or an exercise of the office, and an acquiescence on the part of the public for a length of time, which would afford a strong presumption of at least a colorable election or appointment."²

§ 626. **The modern rule.**—But the more recent decisions recognize even a broader rule; and tend to hold that actual possession of the office, without regard to the mode in which possession was acquired (unless, perhaps, where it was by a forcible usurpation), suffices to constitute the incumbent a good officer *de facto*. This question was fully considered in a decision of the supreme judicial court of Massachusetts, rendered in 1876, wherein the former decisions of that court upon the subject were examined and criticized. The question was, whether notice of intention to take the poor debtor's oath was sufficiently

Hamlin v Dingman, 5 Lans. (N. Y.) 61;
Burton v Patton, 2 Jones L. (N. C.)
124;

Johnson v Stedman, 3 Ohio 94;

Eldred v Sexton, 5 Ohio 215;

Tomlinson v Darnall, 2 Head (Tenn.)
538;

Callison v Hedrick, 15 Gratt. (Va.) 244.

The rule is the same, where the question arises as to an officer in a foreign country. Spaulding v Vincent, 24 Vt. 501.

¹ Rex v Bedford Level, 6 East 358, at p. 368; generalized from Lord Holt in Parker v Kett, 1 Ld. Ray. 658, 660.

Approved in State v Carroll, 38 Conn. 449;

Petersilea v Stone, 119 Mass. 465, and other cases cited in the next succeeding three sections.

² Wilcox v Smith, 5 Wend. (N. Y.) 231, per Sutherland, J., p. 234.

See also, Cary v State, 76 Ala. 78;

People v Tieman, 30 Barb. (N. Y.) 193.

served by one, who had been a constable of the city of Boston, but whose term of office had expired. The court held, that the service was sufficient, on the ground that the constable was an officer *de facto*. Devens, J., delivering the opinion, after quoting the definition given by Bigelow, Ch. J., in *Fitchburg Railroad v. Grand Junction Railroad*, 1 Allen (Mass.) 552, 557, that "the exact distinction between an usurper or intruder and an officer *de facto* is this: the former has no color of title to the office; the latter has, by virtue of some appointment or election," commented upon it as follows: "If this rule were intended as a general definition of an officer *de facto*, it would be incomplete; but the inquiry, there presented to the court, was as to the validity of certain acts, done by one who acted under a commission, *prima facie* valid . . . and it is to be limited to the case then before the court. The reason of public policy, upon which it is held, that the acts of an officer *de facto* are not to be called into question, but are valid as to third persons, may apply even to the case where such officer is a usurper and intruder. This principle has been applied in England to the most important office; after Edward IV obtained the crown, the kings of the line of Lancaster, who had preceded him, were spoken of as '*nuper de facto et non de jure reges Angliæ*;' but although Henry VI had been declared a usurper by act of Parliament, attempts against his authority (not having been in aid of the rightful king), were capitally punished. Third persons, from the nature of the case, cannot always investigate the right of one assuming to hold an important office, even so far as to see that he has color of title to it, by virtue of some appointment or election. If they see him publicly exercising its authority; if they ascertain that this is generally acquiesced in; they are entitled to treat him as such officer. and, if they employ him as

such, should not be subjected to the danger of having his acts collaterally called in question. If the party, thus recognizing the officer *de facto*, were aware that such officer had some appointment or election, it would strengthen his belief; but without this, he would be justified in believing, that an authority, publicly exercised and assented to, was rightfully assumed. . . . The principle, upon which the acts of officers *de facto* have been held valid, has sometimes been extended so far, as to protect them, under certain circumstances, when they have been directly proceeded against. The question then presented is not the same, as that where the rights of third persons only are involved; and in such cases, it would not be sufficient that they had publicly exercised such office, but they might properly be called upon to show they did so, by virtue of some appointment or election, which they had a right to believe valid, even if it were otherwise.”¹

§ 627. **The same subject.**—A recent opinion of the supreme court of North Carolina lays down substantially the same doctrine, although less forcibly and directly, as follows: “I scarcely think it necessary to cite authorities, to show the difference between mere usurpers, and officers *de facto* and *de jure*. A usurper is one who takes possession without any authority. His acts are utterly void, unless he continues to act for so long a time, or under such circumstances, as to afford a presumption of his right to act. And then his acts are valid as to the public and third persons. But he has no defence in a direct proceeding against himself. A *de facto* officer is one, who goes in under color of authority . . . or who exercises the duties of the office so long, or under such circumstances, as to raise a presumption of his right; in which cases his necessary official acts are valid, as to the

¹ *Petersilea v Stone*, 119 Mass. 465, per Devens, J., pp. 467, 468.

public and third persons, but he may be ousted by a direct proceeding. A *de jure* officer is one, who is regularly and lawfully elected or appointed, and inducted into office, and exercises the duties as his right. All his necessary official acts are valid, and he cannot be ousted. The only difference, between an officer *de facto* and an officer *de jure*, is that the former may be ousted in a direct proceeding against him, while the latter cannot be. So far as the public and third persons are concerned, there is no difference whatever. The acts of one have precisely the same force and effect as the acts of the other.”¹ So it was said, in the supreme court of the state of New York: “The distinction between an officer *de facto*, one *de jure*, and a mere usurper, is recognized by the law for the benefit of the public and of third persons, and of the officer only in suits to which he is not a party. A person unquestioned, claiming, entering upon, and exercising the duties of an office, under the forms or color of an appointment or of an election; or a person, without even the color of an election or appointment, permitted by the government for a length of time, unquestioned, to perform the duties of an office, acquires the reputation of being an officer in fact, although he may not be an officer in point of law. The public and third persons cannot be supposed to know or to investigate his title to the office; whether he has complied with the forms of law, taken the oath of office, filed a bond, etc.; or even whether, if appointable, the governor or the mayor has the appointment. The public and third persons, in their dealings with each other, and with him as such acting officer, have therefore a right to act upon such reputation; and as to them he is a good officer, whether he has a legal title to the office or not, so far as they are inter-

¹ *People v Staton*, 73 N. C. 546, per Reade, J., p. 550.

ested in his acts.”¹ It is noteworthy, however, that, although there are many definitions, in the cases, of a usurper, the courts almost invariably find some reason for sustaining the act of one, who appears to be a usurper, within these definitions, where the public or third persons are interested.

§ 628. **The same subject; the doctrine as stated by Butler, Ch. J., in 38 Conn. 449.**—Other cases, wherein the question arose, whether a person was or was not an officer *de facto*, under the particular circumstances of each case, which are cited in the next division of this chapter, illustrate this modern doctrine. The authorities, English and American, from the earliest times, as to the requisites to constitute a good officer *de facto*, were examined, at great length and with great care, by Butler, Ch. J., in an opinion delivered by him in the supreme court of Connecticut, in which he reached the following conclusions, which are now generally accepted, as constituting a correct exposition of the modern doctrine on that subject: “An officer *de facto* is one, whose acts, though not those of a lawful officer, the law, upon principles of policy and justice, will hold valid, so far as they involve the interests of the public and third persons, where the duties of the office were exercised:

“First.—Without a known appointment or election, but under such circumstances of reputation or acquiescence, as were calculated to induce people, without inquiry, to submit to, or invoke his action, supposing him to be the officer he assumed to be.

“Second.—Under color of a known and valid appointment or election, but where the officer has failed to conform to some precedent requirement, or condition, as to take an oath, give a bond, or the like.

¹ *People v Peabody*, 6 Abb. Pr. (N. Y.) 228, per Sutherland, J., pp. 233, 234; 38 C. 15 Haw. Pr. (N. Y.) 470.

See, however, *Foot v Stiles*, 57 N. Y. 399; *Lambert v People*, 76 N. Y. 220, *post*, § 646.

“Third.—Under color of a known election or appointment, void because the officer was not eligible, or because there was a want of power in the electing or appointing body, or by reason of some defect or irregularity in its exercise; such ineligibility, want of power, or defect, being unknown to the public.

“Fourth.—Under color of an election or appointment, by or pursuant to a public unconstitutional law, before the same is adjudged to be such.”¹

II. *Rulings in particular cases, as to whether one is or is not an officer de facto, upon the facts presented.*

§ 629. **References to Chap. XI, ante.**—The requisites, to constitute an officer *de facto*, may best be explained and illustrated, by considering some of the rulings upon that subject, made in particular cases, upon the facts presented. And as these are various, and not always harmonious, they will be most conveniently considered under different heads, according to their characteristic features.

(1.) WHERE THE OFFICER HAS FAILED TO GIVE AN OFFICIAL OATH OR BOND, OR HAS GIVEN ONE THAT IS INSUFFICIENT

In a former chapter, we have stated the rules as to the sufficiency of an official oath or bond, and the general consequences of the failure to give either, in the mode or within the time prescribed by statute.” Such a failure does not, as was there stated, *ipso facto* vacate the office, unless the statute expressly so provides; and words in the statute, to the effect that such a failure shall forfeit the office, will be construed as meaning only that

¹ *State v Carroll*, 38 Conn. 449, per Butler, Ch. J., p. 471, 472.
Followed, *State v Lewis*, 107 N. C. 967.
For a criticism upon, and explanation

of the fourth head of this enumeration, see *Norton v Shelby County*, 118 U. S. 425, as cited *post*, § 638.

² *Ante*, ch. 11.

it shall expose the officer to a judicial sentence of forfeiture. In some cases, it has been held, that after the commencement of judicial proceedings to procure a forfeiture, the officer may still supply the oath or bond, and thus defeat the proceedings.¹ It has therefore been said, that one who has failed to give the statutory oath or bond, is not properly an officer *de facto*; but rather a rightful officer holding by a defeasible title.²

§ 630. **Officer's acts valid as to the public and as to third persons.**—Such officers are, however, usually treated in the books as officers *de facto*. Thus one, elected a justice of the peace, and entering upon the duties of the office, without having taken the official oath, is nevertheless a justice of the peace *de facto*, and his official acts are valid, as far as they concern the public and third persons, until a forfeiture is judicially declared.³ So, an officer is an officer *de facto*, although his official bond is fatally defective;⁴ or although he has refused to qualify in any way;⁵ as by failing to file an acceptance, an omission which the statute declares shall forfeit the office;⁶ or although he has taken his official oath before an officer who had no authority to administer it.⁷ Indeed the cases are practically uniform, to the effect, that the want of, or a defect in, an official oath or bond, does not prevent a person from being a good officer *de facto*, whose acts are valid, with respect to the public and third persons.⁸

¹ *Ante*, §§ 173. *et seq.*

See also, *De Turk v Comm.*, 129 Pa. St. 151.

² *Foot v Stiles*, 57 N. Y. 399, per Dwight, Com'r, p. 403.

See also, *Creighton v Comm.*, 83 Ky. 142.

³ *Weeks v Ellis*, 2 Barb. (N. Y.) 320.

Accord, *Greenleaf v Low*, 4 Denio (N. Y.) 168;

Kottman v Ayer, 3 Strobh. (S. C.) 92;

Ex parte Bollman, 4 Cranch (U. S.) 75.

⁴ *Adams v Tator*, 42 Hun (N. Y.) 384.

⁵ *Coles County v Allison*, 23 Ill. 437.

⁶ *Bentley v Phelps*, 27 Barb. (N. Y.) 524.

⁷ *State v Perkins*, 24 N. J. L. 409.

⁸ *Murphy v Shepard*, 52 Ark. 356;
Hull v Super. Ct., 63 Cala. 174;
Soudant v Wadhams, 46 Conn. 218;
Crawford v Howard, 9 Ga. 314;
Gunn v Tackett, 67 Ga. 725;
Bliss v Day, 68 Me. 201;
Lisbon v Bow, 10 N. H. 187;

(2.) WHERE THE OFFICER HAS FORFEITED HIS OFFICE, OR HIS TERM HAS EXPIRED.

§ 631. **Instances illustrating the rule.**—It follows from the rule, that title to an office cannot be tried collaterally,¹ that an officer, who has done some act, or committed some default, which creates in law a forfeiture of the office, or whose official term has expired; but who nevertheless remains in possession of the office, exercising the functions thereof, is an officer *de facto*, within the rule that such an officer's acts are valid as respects the public and third persons. Thus, where a justice of the peace has removed from the county, whereby, under the statute, he has vacated his office, but he nevertheless continues to exercise the same; he is a justice of the peace *de facto*, until ousted by legal proceedings, and his acts as such are valid within the rule.² So, where a judge or a justice of the peace has accepted an incompatible office, or has been elected to and taken a seat in the legislature, whereby his former office is vacated, and he still acts as a justice or a judge, his right to hold the office can be tried only by information, or perhaps by an action against him; it cannot be impeached collaterally; and his warrant protects the officer who executes it.³ But it

Merrill v Palmer, 13 N. H. 184;

Clark v Ennis, 45 N. J. L. 69;

In re Mohawk & H. R. R. Comp'y, 19 Wend. (N. Y.) 135; .

People v Cook, 8 N. Y. 67;

In re Kendall, 85 N. Y. 302;

Cronin v Gundy, 16 Hun (N. Y.) 520;

Duntley v Davis, 42 Hun (N. Y.) 229;

Dows v Irvington, 13 Abb. N. C. (N. Y.) 162;

Barret v Reed, 2 Ohio 409;

Douglas v Neil, 7 Heisk. (Tenn.) 437.

See also, Cronin v Stoddard, 97 N. Y. 271, cited *post*, § 642.

For a peculiar case, where it was held, that one, entering upon his office after taking an official oath, which was defective, was entitled to sue

for a statutory penalty, as an officer *de jure*, see *Horton v Parsons*, 37 Hun (N. Y.) 42, cited fully, *ante*, § 181.

¹ *Ante*, § 624.

² *Lexington, etc., Turnpike Comp'y v McMurtry*, 6 B. Mon. (Ky.) 214.

See also, *Case v State*, 69 Ind. 46;

McKim v Somers, 1 Penn'a R. (Penrose & Watts) 297.

³ *Fowler v Bebee*, 9 Mass. 231;

Comm. v Kirby, 2 Cush. (Mass.) 577;

Sheehan's Case, 122 Mass. 445;

Comm. v Taber, 123 Mass. 253.

See also, *Coolidge v Brigham*, 1 Allen (Mass.) 333;

Woodside v Wagg, 71 Me. 207.

has been held, in one case, that where a notary public was not a resident of the state, at the time of his appointment, he cannot be regarded as an officer *de facto*, at least not for the purpose of sustaining an indictment for perjury.¹

§ 632. **The same subject.**—So, a judgment, rendered by a justice of the peace, holding over after the expiration of his term of office, and before the commencement of his successor's term, cannot be questioned collaterally for that reason, he having been in undisputed possession of the office.² And the same rule holds, with respect to the official acts of other officers, holding over after the expiration of their respective terms, without regard to the question, whether the particular officer is authorized by law thus to hold over.³ But it has been held, that a deputy county clerk, appointed during the county clerk's first term of office, who continues to act, without a reappointment, during the same person's second term, is not even an officer *de facto*.⁴

(3.) WHERE THE APPOINTMENT OR ELECTION, UNDER WHICH
THE OFFICER HOLDS, WAS IRREGULAR OR INVALID.

§ 633. **Instances illustrating the rule.**—The same rule prevents any impeachment of the acts of an officer, in possession of an office, by reason of any objection to his appointment or election. Thus, where a person had been regularly appointed overseer of a road, by the commissioners' court, and afterwards, another was appointed such overseer by the judge of probate, who had by law

¹ *Lambert v People*, 76 N. Y. 220, cited fully *post*, § 646.

² *Read v Buffalo*, 4 Abb. Ct. App. Dec. (N. Y.) 22; 3 *Keyes* (N. Y.) 447. Accord, *Petersilea v Stone*, 119 Mass. 465, cited *ante*, § 626.

³ *People v Beach*, 77 Ill. 52;

Wapello County v Bigham, 10 Iowa, 39;

Morton v Lee, 28 Kan. 286;

Threadgill v Carolina, etc., R. R. Company, 73 N. C. 178;

Galbraith v McFarland, 3 Coldw. (Tenn.) 267.

⁴ *Smith v Cansler*, 83 Ky. 367, at p. 372.

power to appoint only in case of a vacancy; and the latter entered into possession of the office; it was held, that he was an officer *de facto*, and that his acts in opening a road were valid, although the former was the officer *de jure*. The court, after saying that the power of the judge of probate, in this case, was analogous to that of the governor to appoint a sheriff to fill a vacancy, continued: "An appointment, made by the governor, when a vacancy was supposed to have existed, when in fact, none had really occurred, confers upon the appointee such right to exercise the functions of the office, as to render his acts done therein valid, so far as they concern the public and the rights of third persons. Such an appointment, emanating from the proper authority, and being regular on its face, will constitute the appointee a sheriff *de facto*, even although there be another, who *de jure* is entitled to the office; and where the latter has ceased to perform the duties of the office, and the former does perform them, his acts are not void. Such an appointment is not absolutely void, but irregular, and voidable only. The true distinction, between these irregular appointments to office which are void, and those which are voidable only, I apprehend to be this: where the authority, under which the officer acts, shows, upon its face, that it emanates from a power which had no right to confer it, it is void; but where it is regular on its face, and emanates from a source which has the legal or constitutional right to bestow it, and it requires a reference to facts, not disclosed in the commission or order of appointment, to show that the power of appointment has been illegally or irregularly exercised, the appointment is voidable only. In the former case, all the acts of the appointee, done in reference to such appointment, are void for every purpose; while in the latter, they are valid as to the public and third persons; and this, for the reason, as it has well been said, that the affairs of society

cannot be carried on upon any other principle.”¹ So, the appointment of a sheriff by a county judge, although without authority, suffices to render him a good officer *de facto*, within the rule validating such an officer’s acts.² So, a tax sale confers a good title, although made by a county treasurer, appointed by the county commissioners, when in fact there was no vacancy in the office.³ So, where one, elected the intendant of a town, assumed to act as justice of the peace, although, under the statute, his election did not make him a justice of the peace; it was held that such election constituted a valid foundation for a claim to be a justice of the peace *ex officio*, and thus rendered him a justice of the peace *de facto*.⁴

§ 634. **The same subject**—So, where a justice of the peace was appointed by the trustees of a village, without authority, but under the assumption that the village charter gave them the authority to make the appointment, it was held that he was a justice *de facto*, whose process protected the officer executing it.⁵ So, where a town meeting was invalid, in consequence of a defective return of the warrant calling it, the selectmen then chosen are officers *de facto*, and the town is bound by their official acts.⁶ So, the members of a village board of health are good officers *de facto*, notwithstanding irregularities in the passage of the ordinance creating the board.⁷ So, county commissioners, where the office is created by law, who enter upon the discharge of their duties, are officers *de facto*, whose acts cannot be impeached, by reason of any irregularity in the manner of their election.⁸

¹ *Thompson v State*, 21 Ala. 48, per Ligon, J., pp. 54, 55 approving *Flournoy v Clements*, 7 Ala. 535.

² *People v Roberts*, 6 Cala. 214.

³ *Watkins v Inge*, 24 Kan. 612.

⁴ *Williamson v Woolf*, Ala. Sel. Cas,

(Shephard) 296.

⁵ *Laver v McGlachlin*, 28 Wis. 364.

⁶ *Cushing v Frankfort*, 57 Me. 541.

⁷ *Smith v Lynch*, 29 Ohio St. 261.

⁸ *Waller v Perkins*, 52 Ga. 233.

So a party, even where he has been convicted in a criminal cause, cannot avail himself of any defects in the ballots, whereby the magistrate *de facto*, before whom he was convicted, was elected.¹

§ 635. **The same subject; state government de facto.**—There is no such thing, under the constitution of the United States, as a state *de facto*.² But the officers of, appointed by, and acting under, a state government *de facto*, but which is in rebellion against the United States, are officers *de facto*.³ And so are those appointed by the military authorities, while occupying a state, the government of which is thus in rebellion.⁴

(4.) WHERE THE OFFICER WAS DISQUALIFIED FROM HOLDING THE OFFICE.

§ 636. **Such officer's acts cannot be impeached; instances; exception.**—With one exception, the authorities are uniform and direct, that where a person is disqualified, by constitutional or statutory provision, from holding an office, as where he is an infant;⁵ or a priest;⁶ or an alien;⁷ or one who has borne arms against the United States, after having taken an official oath to support the constitution thereof;⁸ or for any other reason; the fact cannot be shown, for the purpose of impeaching the validity of any act, done by him as an officer *de facto*.⁹

¹ *People v Terry*, 108 N. Y. 1, rev'g 42 Hun (N. Y.) 273.

² *Thompson v Mankin*, 26 Ark. 586.
See also, *Penn v Tollison*, 26 Ark. 545;
Mississippi, etc., R. R. Comp'y v State,
46 Miss. 157.

See, however, *Hawver v Seldenridge*,
2 W. Va. 274, per Maxwell, J., p. 283.

³ *Estis v Prince*, 47 Ala. 269.
See also, *Hildreth v McIntire*, 1 J. J.
Marsh. (Ky.) 206;
Ward v State, 2 Coldw. (Tenn.) 605;

Hawver v Seldenridge, 2 W. Va. 274.

⁴ *Cooper v Moore*, 44 Miss. 386.

⁵ *Green v Burke*, 23 Wend. (N. Y.) 490.

⁶ *McInstry v Tanner*, 9 Johns. (N. Y.)
185.

⁷ *Morrison v Sayre*, 40 Hun (N. Y.) 465;
Fancher v Stearns, 61 Vt. 616.

⁸ *Lockhart v Troy*, 48 Ala. 579.

⁹ *State v Anderson*, 1 N. J. L. 318,
Bates v Dyer, 9 Humph. (Tenn.) 162.

The exception occurs in a ruling of the court of appeals of New York, which is fully cited in a subsequent section.¹

(5.) WHERE THE STATUTE, UNDER WHICH THE OFFICER ACTED, WAS UNCONSTITUTIONAL.

§ 637. **Officer de facto, where statute unconstitutional.**—Although a statute creating a board of supervisors is unconstitutional, yet the acts of those chosen to the office, and acting as such, are valid as the acts of officers *de facto*.² So, if an officer is appointed under a statute, where the constitution requires that he shall be elected.³ Where a statute provided, that in case of the sickness or absence of a judge of a certain court, established and regulated by the constitution, a justice of the peace should be called in by the clerk to hold the court, during such sickness or absence; it was held, that a justice so called in was an officer *de facto*, if not *de jure*, and that, whether the statute was or was not constitutional, a judgment rendered by him, even in a criminal cause, was valid.⁴

§ 638. **Exception; where office itself unconstitutional.**—It has been held, however, by the supreme court of the United States, that where the office itself is created by an unconstitutional statute, the person filling it is not an officer *de facto*, whose acts are valid within the rule heretofore stated. Mr. Justice Field delivered the opinion of the court, containing a long and elaborate citation and review of the authorities, in the course of which he made

¹ *Lambert v People*, 76 N. Y. 220, *post*, § 646.

² *Leach v People*, 122 Ill. 420.

³ *Chicago & N. W. R. W. Comp'y v Langlade County*, 56 Wis. 614.

⁴ *State v Carroll*, 38 Conn. 449, following *Brown v O'Connell*, 36 Conn. 432.

See also, upon the general proposition, that one acting in a lawful office,

although chosen under an unconstitutional statute, is a good officer *de facto*, *Meagher v Storey Co.*, 5 Neva. 244;

Ex parte Strang, 21 Ohio St. 610;

Comm. v McCombs, 56 Pa. St. 436;

Taylor v Skrine, 3 Brevard (S. C.) 516; 2 Brev. new ed., 568.

State v Bloom, 17 Wis. 521;

Cole v Black River Falls, 57 Wis. 110.

these remarks: "The idea of an officer implies the existence of an office which he holds. It would be a misapplication of terms to call one an officer who holds no office; and a public office can exist only by force of law. . . . An unconstitutional act is not a law; it confers no right; it imposes no duties; it affords no protection; it creates no office; it is, in legal contemplation, as inoperative as though it had never been passed." Then, after referring to numerous cases, "in which expressions are used, which, read apart from the facts of the cases, seemingly give support" to the contrary opinion; but which, when read in connection with the facts, "will be seen to apply only to the invalidity, irregularity, or unconstitutionality of the mode, by which the party was appointed or elected to a legally existing office," he continued: "None of them sanctions the doctrine, that there can be a *de facto* office, under a constitutional government, and that the acts of the incumbent are entitled to consideration as valid acts of a *de facto* officer." Referring to the opinion of Chief Justice Butler, in *State v. Carroll*, 38 Conn. 449,¹ which he characterized as "an elaborate and admirable statement of the law," and the definition of an officer *de facto*, as contained therein, the learned justice said: "Of the great number of cases, cited by the chief justice, none recognizes such a thing as a *de facto* office, or speaks of a person as a *de facto* officer, except when he is the incumbent of a *de jure* office. The fourth head refers, not to the unconstitutionality of the act, creating the office, but to the unconstitutionality of the act, by which the officer is appointed to an office legally existing. . . . Where no office legally exists, the pretended officer is merely a usurper, to whose acts no validity can be attached."² But, in a recent case, it was held that one

¹ *Ante*, § 628.

² *Norton v Shelby County*, 118 U. S. 425, per Field, J., pp., 442, 444, 446, 449.

See also, *People v Toal*, 85 Cal. 333;
Ex parte Reilly, 85 Cal. 632;
Hildreth v McIntire, 1 J. J. Marsh.
(Ky.) 206;

may be an officer *de facto*, where the statute creating the office is unconstitutional, before its unconstitutionality has been judicially declared.

(6.) WHERE THE OFFICE HAD BEEN ABOLISHED.

§ 639. **Officer de facto presupposes an office de jure.**—Upon the principle, which governed the decision of the case last cited, an office, which had no legal existence at the time of the transaction upon which a question arises, cannot confer upon a person, claiming to act by virtue thereof, the character of an officer *de facto*. As was said, in a decision by the Missouri supreme court, the rule sustaining the acts of an officer *de facto* does not apply, where the objection is, that the office does not exist; it presupposes an office which the law recognizes.² Thus, where an officer is elected for a term certain, and, before the expiration of the term, the office is abolished by statute, he is thenceforth neither an officer *de jure*, nor an officer *de facto*.³ And it was held, in one case, that the rule protecting a third person, who has relied upon the official act of a person apparently in possession of a municipal office, and has made a contract with him as such, does not bind the municipality, where the contractor had notice that the officer's powers had ceased.⁴ Where a township has been abolished by statute, the offices of the township are also abolished, and after such abolition there can be no township officer *de facto*.⁵ Other cases to the same effect, some of which have been already cited, are given in the note.⁶

Carleton v People, 10 Mich. 250, per Manning, J., p. 259;

State v Fritz, 27 La. Ann. 689, cited post, § 645, and cases cited in the next succeeding subdivision.

¹ Donough v Dewey, 82 Mich. 309.

² Ex parte Snyder, 64 Mo. 58.

³ Long v Mayor, etc., 81 N. Y. 425.

⁴ Conway v St. Louis, 9 Mo. App. 483.

⁵ In re Hinkle, 31 Kan. 712.

⁶ Leach v People, 122 Ill. 420;
Carleton v People, 10 Mich. 250, at p. 259;
Burt v Winona & St. P. R. R. Comp'y,
31 Minn. 472;
Cole v Black River Falls, 57 Wis. 110;
Yorty v Paine, 62 Wis. 154.

§ 640. **The same subject; exception.**—But where a person held the office of director, which by law entitled him to preside at the meetings of the chosen freeholders of a county, and the legislature abolished the office of director, but he nevertheless took the chair and presided at a meeting of the chosen freeholders, with their acquiescence; it was held, that he was the presiding officer *de facto*, and an appointment of a person as county collector, made at that meeting, was valid.¹

(7.) WHAT ACTS CONSTITUTE, OR DO NOT CONSTITUTE, SUFFICIENT POSSESSION OF AN OFFICE, TO RENDER A PERSON AN OFFICER DE FACTO.

§ 641. **Possession as constituting an officer de facto.**—“Where there is but one office, there cannot be an officer *de jure* and an officer *de facto*, both in possession of the office at the same time.”² In order to constitute a person an officer *de facto*, he must be in actual possession of the office, and have the same under his control. If the officer *de jure* is in possession—if he is officer *de jure* and also officer *de facto*—no other person can be an officer *de facto*, with respect to that office; nor can two persons be officers *de facto* for the same office, at the same time.³ There cannot be two incumbents at once; if one is in, the other is not.* Where two officers are acting at the same time, he, who is not the officer *de jure*, can have no benefit from the rules applicable to officers *de facto*, although he claims under color of title.⁵ Where there were two conflicting claimants to an office, and one had been in possession three days, and had performed one official act,

¹ State v Farrier, 47 N. J. L. 383.

² Boardman v Halliday, 10 Paige (N. Y.) 223, per Walworth, Ch'r, p. 232.

See also, Hallgren v Campbell, 32 Mich. 255;

Cohn v Beal, 61 Miss. 398;

Cronin v Gundy, 16 Hun (N. Y.) 520, at p. 524.

³ McCahon v County Com'rs, 8 Kan. 437. See also, Jester v Spurgeon, 27 Mo. App. 477;

Morgan v Quackenbush, 22 Barb. (N. Y.) 72;

Hamlin v Kassafer, 15 Ore. 456.

⁴ Auditors v Benoit, 20 Mich. 176

State v Blossom, 19 Neva. 312.

when the other took possession and held three days, the court decided that neither of them had had sufficient possession to entitle him to sustain the claim, that he was the officer *de facto*.¹

§ 642. **The same subject: where officer de jure is in possession.**—It follows, from these principles, that the actual possession of an office by an officer *de jure*, renders it impossible for another claimant to constitute himself an officer *de facto*, by any performance of official acts, however unequivocal they may be. This is well illustrated by a ruling in the court of appeals of New York, in an action to recover penalties for selling ale and beer, without a license, as required by the excise law. The defendant justified under a license, granted by Bliss and Kinne, as two of the three excise commissioners of the town. It appeared, that at the town meeting in March, 1876, one Bellinger was elected excise commissioner for the term of three years, and immediately thereafter filed his oath of office and his official bond, but the bond was not approved, as required by law, until after the town meeting in 1877. Bellinger, nevertheless, met with the other two commissioners, Lewis and Bliss, as a board of excise in May, 1876, and continued thenceforth to perform the duties of the office. At the town meeting in March, 1877, on the supposition that the failure of Bellinger to procure the approval of his bond created a vacancy, votes were cast for Kinne, as excise commissioner, and he was declared to be elected to fill the vacancy "if any existed;" and immediately thereafter filed an oath of office and an official bond; whereupon he and Bliss notified Lewis to meet with them as a board of excise, which Lewis refused to do. Bliss and Kinne met accordingly, and granted a license to the defendant. It was held, that the defendant was liable for the penalties,

¹ Conover v Devlin, 15 How. Pr. (N. Y.) 470.

on the ground that the license was void. The court said "The difficulty with the appellant's (the defendant's) case is, that when Kinne assumed to act as excise commissioner, the office was already full. Bellinger was in *de jure*, and in 1877 was performing the duties of his office. There was, therefore, no place in which another could act. And this is so, although his official bond was not approved by the supervisor, until after the time when Kinne claims to have been elected. The omission, at the utmost, afforded cause for the forfeiture of the office, but did not create a vacancy. That could be effected only by a direct proceeding for the purpose. . . . It follows, that Kinne had not even an apparent authority or color of title, to act as excise commissioner, and the license granted by him furnishes no defence to the action." ¹

§ 643. **Rival claimants for governorship, each in partial possession; acts of de facto governor.**—Where a controversy arose as to the validity of a pardon, granted by one of two persons, each of whom claimed to have been elected governor of the state, it was held, by the supreme court of South Carolina, that to constitute an officer *de facto*, the person claiming the office must have a presumptive or apparent right thereto, resulting from either a full and peaceable possession of the powers thereof, or reasonable color of title, with actual user of the office; that where each of two persons is in possession of the office, claiming by an apparent title, and the question, as to which one of them is entitled to discharge the functions of the office, arises collaterally, the court must determine which one has the better apparent right; that where the incumbent, being a candidate for reëlection, was defeated, but nevertheless claims that he was elected, procures himself to be inaugurated, and takes

¹ Cronin v Stoddard, 97 N. Y. 271.

possession in part of the office, he is not entitled to be recognized as governor holding over, nor as governor *de facto*, against the person who received the largest number of votes, and who has also entered upon the discharge of the duties of the office.¹ In Wisconsin, where the governor of the state continued to hold, after the expiration of his term of office and the qualification of his successor, claiming that he had been reëlected, and holding the certificate of the state canvassers that he had been so reëlected. but he was afterwards ousted by judicial proceedings; it was held, after the ouster, that his approval of a bill passed by the legislature, while he was so holding over, rendered it a valid statute, as the act of a governor *de facto*.²

§ 644. **Absence of officer *de jure*; intrusion of claimant does not render him officer *de facto*.**—Where there is a contest between two persons, respecting the title to an office, and the one in actual possession leaves, temporarily, and without intention to abandon possession of the office, the place where the business of the office is transacted; and thereupon the other, with full knowledge of the facts, enters such place, and proceeds to transact the business of the office, as though he was the officer; as between those persons, the former is the officer *de facto*.³ In a another case, where the contest was for the office of county treasurer, and one of the claimants, in the absence of the other, wrongfully took from the latter's office the tax duplicate, it was held, that restoration thereof might be enforced by mandamus.⁴

§ 645. **Officer *de facto* must act under claim of title.**—In order to entitle a person to be considered an officer *de facto*, he must not only act as such, but he must act under the claim that he is the rightful officer. As we

¹ *Ex parte Norris*, 8 S. C. 408.

See also, *Ex parte Smith*, 8 S. C. 495.

³ *Braid v Theritt*, 17 Kan. 468.

⁴ *Runion v Latimer*, 6 S. C. 126.

² *State v Williams*, 5 Wis. 308.

have shown, in a preceding portion of this chapter, an officer, appointed unconstitutionally to a lawful office, is nevertheless an officer *de facto*, if his acts otherwise satisfy the requirements of the law in that respect; but where they are insufficient for that purpose, the naked constitutional question is presented. This is shown by a decision of the supreme court of Louisiana, the constitution of which state authorizes a judge, who is "recused" in any cause, to select a lawyer to try that cause. Upon the trial of an information for a criminal offence, the judge, being unable to preside, by reason of illness, appointed a lawyer to preside in his place, pursuant to a statute, authorizing such an appointment in case of the judge's illness; and the defendant was tried before him, and convicted. Upon appeal, the supreme court annulled the judgment, and directed a new trial, on the ground that the statute was unconstitutional, and the appointment was a nullity. The court said: "As to the position that" the lawyer appointed "was *de facto* judge, and therefore his official acts were valid, we will remark that he had no color of title to the office of judge of the superior criminal court; held no commission from the governor; and set up no adverse title to the office. Indeed he never claimed or pretended to be a judge of that court. He recognized Judge A as the judge of the court; and, with his authorization, attempted to perform the duties of that officer, during his inability to act on account of sickness. The sole question therefore in the case, is a question of authority of a judge to appoint an attorney to perform his official duties, during his sickness, in view of the clause of the constitution quoted."¹

§ 646. **Perjury; where notary disqualified when appointed.**—A peculiar case, decided by the court of appeals of the state of New York, which appears to form

¹ State v Fritz, 27 La. Ann. 689.

an exception to the other cases under this subdivision, and also under other subdivisions, will now be examined. It arose upon a writ of error, from the supreme court to the oyer and terminer, brought by the defendant in an indictment for perjury, to review a judgment convicting him; and upon a writ of error, brought by him to the court of appeals, to review the judgment of affirmance, rendered by the supreme court. The charge of perjury was founded upon an affidavit, taken before a person purporting to be a notary public for the city and county of New York. To establish the notary's authority to act, the prosecution proved that he had a business office in the city of New York; that he had acted as notary for several years; and that his name, etc., were upon the official list of notaries for that city. The defence offered evidence, which was rejected, to the effect that the notary, at the time when he was appointed, was, and ever since had been, a resident of the state of New Jersey. A statute of the state of New York provided, that no one was capable of holding a civil office, who, at the time of his appointment, was not a citizen of that state. The supreme court sustained the conviction, on the ground that the notary was an officer *de facto*, whose title could not be assailed collaterally. The court of appeals reversed the judgment. Three opinions were delivered in the latter court. Miller, J., thought that the rule, that the acts of an officer *de facto* were valid, and that his title could not be assailed collaterally, did not apply to a case "where an indictment is found for perjury, and the foundation of the charge rests entirely upon the competency or the jurisdiction of the officer or tribunal, before which the oath is taken. "This," he continued, "was one of the issues presented by the indictment in this case; and, upon principle, it would seem to be quite obvious, that the accused party had a right to show, that there was no such officer or tribunal in existence, as is alleged in the indict-

ment. Such a rule only operates, where a charge of perjury is preferred, while the acts of an officer *de facto*, acting under color of authority, even if he had been illegally appointed, under ordinary circumstances would not be affected or impaired. No pernicious consequences or serious inconveniences would result to the public at large, by the enforcement of such a principle, as all acknowledgments made, or other acts of a notary public, or of any other officer *de facto*, done while in the performance of his duties except, in cases, where false swearing was directly charged, would be valid and lawful." And he disclaimed any intention to hold, that "where the appointment of the officer was valid, a subsequent disability can be made the subject of inquiry, in any other manner than by a direct proceeding for that purpose; or that his acts, as an officer *de facto*, are not valid, until he is lawfully declared to be disqualified." Earl, J., said, that in order to constitute an officer *de facto*, he must have "color of office, or some semblance of competent authority;" that an officer may, in some cases, have sufficient color without any appointment or election, "as when he takes possession of the public building or room, where the duties are to be discharged, and has possession of the public property pertaining to the office; and is thus clothed with all the *indicia* of official position, and has, for a considerable time, with the acquiescence of the public, and without dispute, openly and notoriously exercised the duties of the office." . . . "But," he continued, "a notary public, having no public office, clothed with none of the symbols or outward tokens of public position, being one of the thousands who may, anywhere in the same county, exercise the duties of the same office, cannot get color of office, by simply acting from time to time, as he might have opportunity. He can get color of office only by an appointment, emanating from the appointing power, or from some power having, at least, a colorable right to

make the appointment." Hand, J., while agreeing that the evidence as to the notary's residence was improperly excluded, and that the judgment ought therefore to be reversed, said: "I am not prepared to assent to the doctrine of the opinion, that perjury can only be committed before an officer *de jure*; and that, on the trial of an indictment for that crime, the title of such an officer can always be attacked. Nor, indeed, am I prepared now to say, that if, in the present case, the commission of the notary from the proper appointing power had been shown, the prisoner could have raised such a question as non-residence. I am inclined to think, that, in such a contingency, the question of residence being often a very nice one, the validity of the appointment could not be thus attacked. But here there was hardly any proof that the party who took the affidavit was a notary at all. . . . But if it be conceded, that it" (the proof on the part of the prosecution) "tended in some degrees to show a *de facto* officer, or to raise a presumption or inference that he had been appointed; I think proof that the person was a non-resident, and therefore incapable of holding that position, was admissible, to rebut any presumption that he had ever been appointed, and was anything but a mere intruder. Of course, if legal proof, of any sort, of an appointment, had been made, there would be no longer any room for presumption upon this point, and nothing of that sort which could be rebutted; but not so, as the case now stands." Of the other four judges, one concurred with Miller, J.; one concurred with Hand, J.; one concurred with Earl, J., and the fourth gave no opinion upon this particular point.¹

¹ *Lambert v People*, 76 N. Y. 220, rev'g 14 Hun (N. Y.) 512.

The reasoning of Hand, J., finds support in a ruling of the supreme court of Alabama, to the effect, that a commission from the appointing power cannot be impeached col-

laterally, by proof that the appointment was unlawful. *Thomson v State*, 21 Ala. 48, at p. 54. That a notary public, by user of his office, becomes an officer *de facto*, see *Cary v State*, 76 Ala. 78.

§ 647. **Act of exercise of power must be lawful.**—In order that an act of exercise of power should furnish a foundation for deeming a person an officer *de facto*, it must be such an act, as he could lawfully perform, if he was the rightful officer which he assumes to be. Thus, where the people of the township of F, at a general election, elected an assessor of taxes for the township, and also elected one D, as assessor for the incorporated town of A, which was situated within the township limits; and D, following a custom which had existed for the preceding ten years, assessed land without the corporate limits of A; it was held, that the assessment was a nullity; and a sale thereunder for unpaid taxes was void. The court, after showing that D's election was irregular, said: "While the election of D was irregular, he may be regarded as the assessor *de facto* of the town of A, and all his acts as such, within the limits of his official powers, are valid, so far as they involve the interests of third persons and the public. . . . The question does not arise, whether D was *de facto* assessor of F township. He did not act as such, nor assume the duties of that office. He simply performed acts, in his official capacity, as assessor of A, which the law required another officer to do. The discussion upon the point, made by defendant's counsel, that D was the assessor *de facto*, and his acts are therefore valid, does not apply to the facts of the case. Had D made the assessment as the assessor of F township, the argument of counsel on this point would be applicable to the case. . . . In order to support the acts of one, on the ground that he is a *de facto* officer, they must be done under color of the office, the duties of which must have been assumed and discharged by the person claiming to fill the office. This, we think, is essential, to give one the character of an officer *de facto*, and render his acts valid. . . . The fact that D made the assessment under a custom, extending his powers and duties, in

a manner and to subjects unauthorized by law, which was acquiesced in by the officer charged with such duties, cannot make his act valid. Customs of this kind cannot abrogate the law. Neither can it be pretended, that a mistaken idea, as to the extent of the powers and duties of an officer, though honestly entertained by himself and the people, will validate acts done in excess of his authority.”¹

§ 648. **Officer de facto: his authority; how terminated.**—Where his color of authority ceases, the person claiming to be an officer is no longer an officer *de facto*; as where a competent tribunal, in a direct proceeding to determine his title, has adjudged that he has no title; and this, although no other person has been declared to be entitled to the office.² And, pending an appeal from such a decision, the party, in whose favor it was given, is deemed the rightful officer, and will be put into possession, if he is not already in, by summary legal proceedings.³

III. *Rulings respecting the validity and effect of acts of officers de facto, in particular cases.*

§ 649. **The general rule restated.**—In stating the general rule, respecting the validity of the acts of officers *de facto*, at the beginning of this chapter, it was also stated, that the authorities establishing the rule would be cited, in a subsequent portion of the chapter. That citation is to be made here, and preliminarily we will restate the rule itself, which is as follows: The exercise of a power by an officer *de facto*, either judicial or ministerial, which lawfully pertained to the office of which he had possession, is valid and binding, where it is for the interest of

¹ Bailey v Fisher, 38 Iowa 229.

Nat. Bk., 60 Barb. (N. Y.) 234.

² Petition of Portsmouth, 19 N. H. 115;

³ Honey v Davis, 38 Tex. 63.

Rochester, etc., R. R. Comp'y v Clarke

the public, or of any individual, except the officer himself, to sustain the officer's act; but where the officer himself founds a right upon such exercise, either personally or officially, it is not valid in his favor.¹

¹ 2 Kent's Commentaries, 13th ed., 295;

Leak v Howel, Cro. Eliz. 533;

O'Brian v Knivan, Cro. Jac. 552;

Harris v Jays, Cro. Eliz. 699;

Knight v Wells, Lutw. 508, 519;

Rex v Lisle, Andrews 163; 2 Stra. 1090;

Knowles v Luce, Moore, 109;

Margate Pier v Hannam, 3 B. & A. 266;

Rex v Bedford Level, 6 East. 356;

In re Dacres, Leonard 288;

Eaton v Harris, 42 Ala. 491;

Lockhart v Troy, 48 Ala. 579;

Cary v State, 76 Ala. 78;

Kaufman v Stone, 25 Ark. 336;

Chiles v State, 45 Ark. 143;

Satterlee v San Francisco, 23 Cal. 314;

McCall v Byram Man. Comp'y, 6 Conn. 428;

Plymouth v Painter, 17 Conn. 585;

Douglass v Wickwire, 19 Conn. 489;

State v Carroll, 38 Conn. 449;

Pool v Perdue, 44 Ga. 454;

Smith v Meador, 74 Ga. 416;

Pritchett v People, 1 Gilm. (Ill.) 525;

People v Ammons, 5 Gilm. (Ill.) 105;

Sharp v Thompson, 100 Ill. 447;

Golder v Bressler, 105 Ill. 419;

People v Lieb, 85 Ill. 484;

Leach v Cassidy, 23 Ind. 449

Gumberts v Adams Express Comp'y,
28 Ind. 181;

Bailey v Fisher, 38 Iowa 229;

Peirce v Weare, 41 Iowa 378;

Brady v Sweetland, 13 Kan. 41;

Morton v Lee, 28 Kan. 286;

Creighton v Comm., 38 Ky. 142;

State v Lewis, 22 La. Ann. 33;

Brown v Lunt, 37 Me. 423;

Cushing v Frankfort, 57 Me. 541;

Bliss v Day, 68 Me. 201;

Woodside v Wagg, 71 Me. 207;

Johnson v McGinly, 76 Me. 432;

Fowler v Bebee, 9 Mass. 231;

Comm. v Fowler, 10 Mass. 290;

Bucknam v Ruggles, 15 Mass. 180;

Gilmore v Holt, 4 Pick. (Mass.) 258;

Doty v Gorham, 5 Pick. (Mass.) 487;

Sprague v Bailey, 19 Pick. (Mass.) 436;

Coolidge v Brigham, 1 Allen (Mass.)
333;

Elliott v Willis, 1 Allen (Mass.) 461;

Fitchburg Railroad Comp'y v Grand
Junction R. R. & D. Comp'y, 1 Allen
(Mass.) 552;

Sudbury v Heard, 103 Mass. 543;

Petersilea v Stone, 119 Mass. 465;

Carleton v People, 10 Mich. 250;

Druse v Wheeler, 22 Mich. 439;

Auditors v Benoit, 20 Mich. 176;

Jhons v People, 25 Mich. 499;

Stockle v Silsbee, 41 Mich. 615;

Taylor v Taylor, 10 Minn. 107;

McCormick v Fitch, 14 Minn. 252;

Carli v Rhener, 27 Minn. 292;

Shelby v Alcorn, 36 Miss. 273;

Cooper v Moore, 44 Miss. 386;

St. Louis County Court v Sparks, 10
Mo. 117;

Ex parte Johnson, 15 Nebr. 512;

Mallett v Uncle Sam, etc. Comp'y, 1
Neva. 188;

Jones v Gibson, 1 N. H. 266;

Johnston v Wilson, 2 N. H. 202;

Merrill v Palmer, 13 N. H. 184;

Bedford v Rice, 58 N. H. 446;

Jewell v Gilbert, 64 N. H. 13;

State v Tolan, 33 N. J. L. 195;

State v Pierson, 47 N. J. L. 247;

State v Farrier, 47 N. J. L. 383;

Parker v Baker, 8 Paige (N. Y.) 428;

People v Collins, 7 Johns. (N. Y.) 549;

McInstry v Tanner, 9 Johns. (N. Y.)
135;

Trustees, etc., v Hills, 6 Cow. (N. Y.)
23;

Wilcox v Smith, 5 Wend. (N. Y.) 231;

§ 650. **Instances; payments to officer de facto valid.**—The cases, cited under the last preceding division of this chapter, contain many illustrations of the force and effect of acts, done by an officer *de facto*, in the course of the discharge of the duties appurtenant to the office, which he claims to fill; only a few, presenting some special features, will be examined here. That a disbursing officer has the right to rely upon the apparent title of an officer *de facto*, and discharge himself, or the public body for which he acts, by payment to such officer of the salary or other emoluments of the office, was shown in a preceding chapter.¹

§ 651. **Criminal law; authority of judge de facto cannot be questioned.**—The question whether a person, con-

People v Bartlett, 6 Wend. (N. Y.) 422;
In re Mohawk & Hudson R. R.

Comp'y, 19 Wend. (N. Y.) 135, 145;

People v Kane, 23 Wend. (N. Y.) 414;

Green v Burke, 23 Wend. (N. Y.) 490;

People v White, 24 Wend. (N. Y.) 521,
 at p. 525;

People v Covert, 1 Hill (N. Y.) 674;

People v Stevens, 5 Hill (N. Y.) 616;

People v Hopson, 1 Denio (N. Y.) 574;

Greenleaf v Low, 4 Denio (N. Y.) 168;

Mayor, etc., v Tucker, 1 Daly (N. Y.)
 107;

Dows v Irvington, 13 Abb. N. C. (N. Y.)
 162;

Weeks v Ellis, 2 Barb. (N. Y.) 320;

Bentley v Phelps, 27 Barb. (N. Y.) 524;

Coiton v Beardsley, 38 Barb. (N. Y.) 29;

Morrison v Sayre, 40 Hun (N. Y.) 465;

Foot v Stiles, 57 N. Y. 399;

Lambert v People, 76 N. Y. 220;

People v Terry, 108 N. Y. 1;

Burton v Patton, 2 Jones L. (N. C.) 124;

Com'rs v McDaniel, 7 Jones L. (N. C.)
 107;

State v Allen, 2 Ired. L. (N. C.) 183;

Burke v Elliott, 4 Ired. L. (N. C.) 355;

People v Staton, 73 N. C. 546;

Ex parte Strang, 21 Ohio St. 610;

Hamlin v Kassafer, 15 Oreg. 456;

McKim v Somers, 1 Penn'a (Penrose &
 Watts) 297;

Thompson v Ewing, 1 Brewst. (Pa.) 67;

Baird v Bank of Washington, 11 Serg.
 & R. (Pa.) 411;

Clark v Comm., 29 Pa. St. 129;

Comm. v McCombs, 56 Pa. St. 436;

Taylor v Skrine, 2 Tread. (S. C.) 696;

State v McJunkin, 7 S. C. 21;

Pearce v Hawkins, 2 Swan (Tenn.) 87;

Farmers & M. Bk. v Chester, 6 Humph.
 (Tenn.) 458;

Mayor, etc. v Thompson, 12 Lea (Tenn.)
 344;

Kelley v Story, 6 Heisk. (Tenn.) 202;

Douglas v Neil, 7 Heisk. (Tenn.) 437;

Venable v Curd, 2 Head (Tenn.) 582;

Aulanier v Governor, 1 Tex. 653;

Cocke v Halsey, 16 Pet. (U. S.) 71;

Norton v Shelby County, 118 U. S. 425;

McGregor v Balch, 14 Vt. 428;

Cummings v Clark, 15 Vt. 653;

Hawver v Seldenridge, 2 W. Va. 274;

State v Williams, 5 Wis. 308;

Yorty v Paine, 62 Wis. 154.

See also, many other cases in this
 chapter, *ante*, and *post*.

¹ *Ante*, §§ 513-517.

victed of a crime, can successfully take the objection that the judge, or one of the judges, who held the court at which he was convicted, was only a judge *de facto*, was discussed in a capital case, decided by the court for the correction of errors of the state of New York; but the judges did not concur in a definite ruling upon this point.¹ It was afterwards, however, held, by the supreme court of the same state, that, even in a capital case, the legality of the court, in which a conviction was had, cannot be impeached, on the ground that one of the two judges who held the court was ineligible.² And in other cases it has been held, that a court, held by a judge *de facto*, is competent to try an indictment or a complaint in a criminal cause; and that the constitutional provision, that no person shall be deprived of life or liberty, without due process of law, is not infringed by a conviction and sentence in such a court.³

§ 652. **General proposition as to exercise of judicial power; instances.**—The general proposition, that the validity of the exercise of judicial power, by an officer *de facto*, is governed by the same rules as where the power is ministerial, is established by several cases, most of which have been cited in the preceding sections of this chapter.⁴ The rule has been applied to a judge appointed, during the civil war, by the provisional military governor

¹ *People v White*, 24 Wend. (N. Y.) 520; s. c. in the supreme court, 22 Wend. (N. Y.) 167.

² *Ostrander v People*, 29 Hun (N. Y.) 513.

³ *State v Carroll*, 38 Conn. 449, cited *ante*, § 628;
State v Murdock, 86 Ind. 124;
State v Pertsdorf, 33 La. Ann. 1411;
People v Terry, 108 N. Y. 1, rev'g 42 Hun (N. Y.) 273;
Campbell v Comm., 96 Pa. St. 344;
In re Ah Lee, 8 Sawyer (U. S.) 410.

For a case where it was held, that the person, who acted as judge in a criminal cause, was not a judge *de facto*, see *State v Fritz*, 27 La. Ann. 689, cited *ante*, § 645.

⁴ *Ante*, §§ 630, 631, 633, 634, etc.
 See also, *Lockhart v Troy*, 48 Ala. 579;
Keith v State, 49 Ark. 439;
Brady v Howe, 50 Miss. 607;
Coyle v Sherwood, 4 T. & C. (N. Y.) 34;
 1 Hun (N. Y.) 272;
State v Lewis, 107 N. C. 967;
Fancher v Stearns, 61 Vt. 616.

of a state.¹ Where A was elected and commissioned as judge of the county court; and, supposing that his term commenced immediately, he proceeded to hold the court; but afterwards the superior court determined that his predecessor's term had not expired; and his predecessor did not institute any proceedings to oust him, but practiced as an attorney in the court; it was held, that A was the judge *de facto* of the court, and that his acts as judge had the same force and effect, as if he had been the judge *de jure*.² So, where a judge holds over, after his successor's election, insisting that the act ousting him is invalid, he is the judge *de facto*, whose acts as judge are valid.³

§ 653. **Perjury; oath before officer de facto; limitation of the rule.**—The peculiar ruling of the court of appeals of the state of New York, with respect to an indictment for perjury in an affidavit, taken before a person ineligible to the office in which he acted—a ruling, with respect to which it may be said, that some of the reasons assigned for the decision are fairly questionable—has already been given at length.⁴ It was also held, in the same state, by a county court, that perjury could not be assigned upon an oath, taken before an officer, acting without color of title.⁵ In an English case, upon the trial of an indictment for perjury, committed in an oath, taken before one who had acted as surrogate for more than twenty years, it was held, at *nisi prius*, that his acting in that capacity was *prima facie* evidence of his appointment, and of his authority to administer the oath; but evidence of an irregularity in his appointment was admitted, upon which Lord Ellenborough directed an

¹ *Cooper v Moore*, 44 Miss. 386.

³ *Fleming v Mulhall*, 9 Mo. App. 71.

² *McCraw v Williams*, 33 Gratt. (Va.) 510.

⁴ *Lambert v People*, 78 N. Y. 220, *ante*, § 646.

See also, *Bland and G. County Judge case*, 33 Gratt. (Va.) 443.

⁵ *People v Albertson*, 8 How. Pr. (N. Y.) 363.

acquittal.¹ In Illinois, it has been held, that one may be convicted of perjury, upon proof that the officer, who administered the oath, was acting as an officer *de facto*; the court not passing upon the question, whether proof, that he was not an officer *de jure*, was admissible in rebuttal.² But whatever may be the rule, where the officer was ineligible, the court of appeals of New York has distinctly held, that one swearing falsely before an officer *de facto*, cannot escape punishment, by showing any irregularity or defect in the mode of his appointment, or his failure to comply with any provision of the statute, relating to an official oath or bond.³

§ 654. **Resistance to officer de facto.**—An officer *de facto* cannot lawfully be resisted in the exercise of his office, and the defendant in a civil action or a criminal prosecution, founded upon such resistance, cannot assail the officer's title. Thus it was held, that upon the trial of an indictment for resisting a constable, while he was discharging his duty, the defendant cannot show, that the officer had not taken an official oath or given an official bond, as required by the statute; it suffices that he is an officer *de facto*; and the rule, that an officer asserting a right must be an officer *de jure*, does not apply, because the people are the party, and the officer is only a witness.⁴ And where a deputy constable was indicted and tried for murder, for killing a person resisting him in the discharge of his office, it was held, that he could not lawfully be resisted, although he had not taken the oath of office, as the statute required, and that he was in all respects to be treated as a rightful officer.⁵

¹ *Rex v Verelst*, 3 Campb. 432

² *Morrell v People*, 32 Ill. 499.

³ *People v Cook*, 8 N. Y. 67, aff'g 14 Barb. (N. Y.) 259.

See comments upon this ruling by

Miller, J., Lambert v People, 76 N. Y. 220, on p. 231.

⁴ *People v Hopson*, 1 Denio (N. Y.) 574.

⁵ *State v Dierberger*, 90 Mo. 369.

See also, *Heath v State*, 36 Ala. 273.

§ 655. **Appointees of officer *de facto*; the English cases.**—The question, whether an officer *de facto* can confer upon another, by appointing the latter to an office within his gift, a better title than the appointing officer has, is one upon which the authorities are in conflict. The English rule appears to be, that where an officer is ousted by quo warranto, those who were appointed by him, when he was the officer *de facto*, are concluded by the judgment as privies to the defendant, and lose their places. Thus, where quo warranto was brought to oust the defendant from the office of burgess of the town of Christ Church, to which he had been appointed by one G, who was then mayor *de facto* of the town; it was held that the judgment upon a quo warranto against G, ousting him from the office of the mayor, was conclusive upon the defendant.¹ And where it appeared that one L presided, as mayor, at the election of the defendant as chief burgess of a town, it was held, that judgment against L, on an information for usurping the office of mayor, was evidence of want of title of L, in an information in the nature of a quo warranto against the defendant, who derived title, in part, from L.²

§ 656. **The same subject; American cases.**—In a case in the former supreme court of New York, where the question was, whether the relator had been appointed clerk of the common council of Brooklyn, by a balloting of the board of aldermen, resulting in nine votes for the relator, and nine for the incumbent, whereupon the incumbent held over; but the relator claimed the office, on the ground that one of the aldermen, voting for the incumbent, was not legally elected; it was said by Bronson, J., that the vote of the disqualified officer was not a nullity, and

¹ *Rex v Lisle*, Andrews 163, 2 Stra. 1,090.

See also, *Rex v Mayor*, etc., 5 Term R. (D. & E.) 66.

² *Rex v Grimes*, 5 Burr. 2,599.

See also, *Rex v Hebden*, Andrews 389.

the relator was not elected. But the other judges decided in favor of the defendant, without adverting to this point.¹ In the present supreme court of New York, in an action in the nature of a quo warranto, where the relator had been appointed clerk of a district court by a justice, who was afterwards ousted, by a judgment in an action in the nature of a quo warranto, and, by the same judgment, another was declared to be entitled to the office, who appointed the defendant such clerk; it was held, that the defendant was entitled to recover, upon substantially the same grounds as those upon which the English cases, cited in the last section, were decided, and that the judgment was evidence against the relator.² And this decision was cited with approbation in the court of appeals of New York, in a case which was decided upon another ground.³

§ 657. **The same subject.**—But the supreme court of North Carolina has held, that the appointment of an officer of a court by a judge *de facto*, is an act, in which the public and third persons have an interest, and which is therefore valid and binding, so that, after ouster of the appointing judge, the officer's term being fixed by law, the judge *de jure*, who has been put in possession, has no power to appoint another in his place.⁴ So, the supreme court of Ohio, upon an information in the nature of a quo warranto, against the clerk of a court, appointed by the votes of two judges, who had since been ousted, ruled that the appointment was valid, and entitled the clerk to continue to hold the office.⁵ So it was held, by the same court, that two of three county commissioners, whose residence, under a statute creating a new county, fell in the new county, were still commissioners *de facto* of the original county; and that the appointment, by their votes, of a

¹ *People v Stevens*, 5 Hill (N. Y.) 616.

² *People v Anthony*, 6 Hun (N. Y.) 142.

³ *People v Murray* 73 N. Y. 535.

⁴ *People v Staton*, 73 N. C. 546.

See also, *Brady v Howe*, 50 Miss. 607, cited *ante*, § 440.

⁵ *State v Alling*, 12 Ohio 16.

county treasurer, the third commissioner refusing to act with them, is valid for the full term of the treasurer.¹

§ 658. **Liability of officer de facto for acts of appointee, when appointment unlawful.**—It has been held, that the rule, that an officer *de facto* cannot assert a right or maintain a defence, without showing that he is also an officer *de jure*, extends to those by whom he was appointed; and where the selectmen of a town had illegally appointed a person surveyor, the plaintiff, in an action for illegally seizing his property, was allowed to recover against the selectmen and the surveyor; the court holding that the selectmen were no more protected, than the person appointed by them.² But this ruling was disapproved, and a ruling to the contrary made, by the supreme court of New York, which held, that where the trustee of a school district made an oral appointment of a collector, and issued to him a warrant for the collection of the school tax; the collector was an officer *de facto*; although the appointment was void; and that an action would not lie against the trustee for the collector's acts, in seizing and selling the plaintiff's property, on the ground that he, as well as all other persons except the officer, was within the rule validating the acts of an officer *de facto*.³

IV. *Where the officer seeks to maintain his own rights or interests, he must show that he is an officer de jure, as well as de facto.*

§ 659. **The general proposition; illustrations and exceptions.**—This exception to the general rule, valid-

¹ State v Jacobs, 17 Ohio 143.
See also, Mallett v Uncle Sam G., etc.,
Comp'y, 1 Neva. 188.

² Cummings v Clark, 15 Vt. 653.
See also, Allen v Archer, 49 Me. 346.

³ Hamlin v Dingman, 5 Lans. (N. Y.) 61,
rev'g 41 How. Pr. (N. Y.) 132.

Cited approvingly, Burditt v Barry,
6 Hun (N. Y.) 657;

Foot v Stiles, 57 N. Y. 399, per Dwight,
Com'r, p. 403;

Lambert v People, 76 N. Y. 220, per
Earl, J., p. 237;

Olmsted v Dennis, 77 N. Y., 378, per
Earl, J., p. 387.

ating the acts of an officer *de facto*, occurs in cases, where the officer alone is concerned, either personally or officially. It is recognized in several of the cases hereinbefore cited, and directly in those contained in the note, which hold, that where an officer claims any right, by virtue of his office, he must show that he is officer *de jure*, as well as officer *de facto*;¹ except that he is entitled to be allowed for public money, expended by him for lawful purposes, as if he was also an officer *de jure*.² Thus, as was said by a learned chief judge of the court of appeals of New York: "Where a person sets up a title to property, by virtue of an office, and comes into court to recover it, he must show an unquestionable right. It is not enough that he is an officer *de facto*, that he merely acts in the office; but he must be an officer *de jure*, and have a right to act." ³

§ 660. **The same subject.**—Where an infant, elected constable, and acting as such, made a levy under an execution, and subsequently abandoned the levy, to relieve himself from the consequences of his unlawful attempt to act as an officer; it was held, that the constable, and also the plaintiffs, if they knew that he was an infant, were trespassers; that if the constable had proceeded to sell under the execution, the transaction would have been valid; but, as he had abandoned the levy, and

¹ *Miller v Callaway*, 32 Ark. 666;
People v Weber, 86 Ill. 283; s. c. 89 Ill.
 347;
Patterson v Miller, 2 Met. (Ky.) 493;
Kimball v Alcorn, 45 Miss. 151;
Adams v Tator, 42 Hun (N. Y.) 384;
Dolan v Mayor, etc., 68 N. Y. 274;
Dillon v Myers, Bright. (Pa.) 426;
Riddle v Bedford County, 7 Serg. & R.
 (Pa.) 386;
Venable v Curd, 2 Head (Tenn.) 582;
Shepherd v Staten, 5 Heisk. (Tenn.) 79;
 and cases cited in the notes to the

subsequent sections of this division.

² *McCracken v Soucy*, 29 Ill. App. 619.
³ *People v Nostrand*, 46 N. Y. 375, per
 Church, Ch. J., at p. 382.
Accord, *Fowler v Bebee*, 9 Mass. 231;
People v White, 24 Wend. (N. Y.) 520;
People v Hopson, 1 Denio (N. Y.) 574;
Hamlin v Dingman, 5 Lans. (N. Y.) 61;
Nichols v MacLean, 101 N. Y. 526, aff'g
 19 Week. Dig. (N. Y.) 96; 63 How.
 Pr. (N. Y.) 448;
Olmsted v Dennis, 77 N. Y. 378, at p. 387;
Keyser v McKissan, 2 Rawle (Pa.) 139.

returned the execution, the levy was a nullity, and the plaintiffs might have a new execution.¹ The rule, that an officer who is ineligible, or otherwise only an officer *de facto*, cannot justify as an officer, where he is sued for an official act, has been settled in several cases.² But an officer justifying may always show, in his defence, that he was an officer *de facto*; for that is *prima facie* evidence that he was an officer *de jure*.³ And it has been held, that one, acting by command and in aid of an officer *de facto*, may justify, although the latter was not officer *de jure*.

§ 661. **Suit for fees or salary; officer cannot recover, unless *de jure*.**—A person, who sues to recover from a municipality, or other public body, the salary or other emoluments attached to an office, which he claims to hold; or who sues a private person, to recover fees allowed by law for official services; must, if his right to the salary, fees, or other emoluments, is put in issue, show, not only that he has acted as such officer, but also that he did so as an officer *de jure*.⁴ So, where a statute forbade any person to exercise the office of pilot, until he had given a bond with two sureties in the penal sum of \$1,000;

¹ Green v Burke, 23 Wend. (N. Y.) 490.

² Miller v Callaway, 32 Ark. 666;
People v Weber, 86 Ill. 283; s. c. 89 Ill. 347;
Patterson v Miller, 2 Met. (Ky.) 493;
Rodman v Harcourt, 4 B. Mon. (Ky.) 224;
Colburn v Ellis, 5 Mass. 427;
Short v Symmes, 150 Mass. 298;
Johnston v Wilson, 2 N. H. 202;
Blake v Sturtevant, 12 N. H.
Pearce v Hawkins, 2 Swan (Tenn.) 87
Cummings v Clark, 15 Vt. 653;
Courser v Powers, 34 Vt. 517.

³ Willis v Sproule, 13 Kan. 257.

⁴ Soudant v Wadhams, 46 Conn. 218.

Contra, *semble*, Johnston v Wilson, 2 N. H. 202.

⁵ See *ante*, §§ 517, 518; also, People v Potter, 63 Cal. 127;
Plymouth v Painter, 17 Conn. 585;
Mayfield v Moore, 53 Ill. 428;
McCue v Wapello Co., 56 Iowa 698;
Kimball v Alcorn, 45 Miss. 151;
Christian v Gibbs, 53 Miss. 314;
Meagher v Storey County, 5 Neva. 244;
Neale v Overseers, 5 Watts (Pa.) 538;
Comm. v Slifer, 25 Pa. St. 23;
Philadelphia v Given, 60 Pa. St. 136.
That payment by a municipality to an officer *de facto* protects it from a subsequent claim of the officer *de jure*, see *ante*, §§ 513-516.

it was held, that this meant, that each of the sureties must be bound in the whole sum; and where a person had given a bond with two sureties, each in the penal sum of \$500, upon which the commissioners of pilots had issued a commission to him, and he thereupon proceeded to act as pilot; it was further held, that, assuming that the office of pilot was a public office, he was only an officer *de facto*, and that, not being an officer *de jure*, he could not recover his pilotage.¹

§ 662. **The same subject; recovery of statutory penalty.**—Where a statute annexes a pecuniary penalty to an offence, and empowers a particular officer to sue for it, a person suing for the penalty must show that he is the officer *de jure*, as well as *de facto*.² This results from the rule, that he must sue in his individual name, with the addition of his official title; and in pleading he must allege, that he is the officer he purports to be, upon which issue may be taken.³ But where a statutory penalty is given to a town, county, or other municipality, an action therefor may be maintained, by the municipality, although the penalty was incurred by the violation of rules established by officers of the municipality, who were merely officers *de facto*, ex. gr. a board of health.⁴

§ 663. **Rule as to trial of title, in suit between officers *de jure* and *de facto*, to recover emoluments.**—It has been held, that the rule that the title to an office cannot be tried, when it comes in question collaterally, but that it can be tried only in a direct proceeding for that purpose, does not prevent a person, who had been in possession of an office, from maintaining an action against an intruder, to recover the emoluments of the office, where he had

¹ *Dolliver v Parks*, 136 Mass. 499.

² *Horton v Parsons*, 37 Hun (N. Y.) 42, cited fully, *ante*, § 181;
People v Nostrand, 46 N. Y. 375.

³ *Gould v Glass*, 19 Barb. (N. Y.) 179;
Supervisor v Stimson, 4 Hill (N. Y.) 136;
Com'rs v Peck, 5 Hill (N. Y.) 215.

⁴ *Bedford v Rice*, 58 N. H. 446.

been ousted by the latter's act:¹ and *semble*, that such an action will lie, by a rightful officer, even if he has not previously been in possession.² And where an office pertains to a court of justice, the right to the possession thereof may be determined, at least *prima facie*, upon a motion by the rightful officer to be admitted.³ The right of an officer *de jure*, to recover the emoluments of the office from the officer *de facto*, after ouster of the latter, has been considered elsewhere.⁴

V. *Miscellaneous rulings, as to the rights and liabilities of an officer de jure and an officer de facto.*

§ 664. **Liability of officer de facto in civil action for malfeasance, etc.**—Under this head, we will cite a few cases, which could not be conveniently placed under either of the foregoing heads. An officer *de facto*, although he was not duly appointed, or holds by a defeasible title, is nevertheless bound to perform all the duties of the office, which he professes to hold, and is liable to an action for any act of malfeasance, misfeasance, or nonfeasance, in the same manner as if he was an officer *de jure*. Thus, if he is sued for money received *colore officii*, it is no defence that he was only an officer *de facto*.⁵ So, where he is sued for any act of malfeasance or misfeasance.⁶ Other cases, wherein the rule is declared, that he is liable in like manner as an officer *de jure*, are cited in the note.⁷ A collector of taxes *de facto* is liable

¹ Glascock v Lyons, 20 Ind. 1.
Accord, Howard v Wood, 2 Levinz 245.

² Id.; and Lightly v Clouston, 1 Taunt. 112, per Heath, J.

³ Bruce v Fox, 1 Dana (Ky.) 447.

⁴ Ante, §§ 521-523.

⁵ United States v Maurice, 2 Brock. (U. S.) 96.

⁶ Neale v Overseers, 5 Watts (Pa.) 538.

See also, Bearce v Fossett, 34 Me. 575;
Longacre v State, 3 Miss. 637;

Jones v Scanland, 6 Humph. (Tenn.) 195;

Borden v Houston, 2 Tex. 594.

Allen v Archer, 49 Me. 346;

Trescott v Moan, 50 Me. 347; .

Sandwich v Fish, 2 Gray (Mass.) 298;

Johnston v Wilson, 2 N. H. 202;

Horn v Whittier, 6 N. H. 88;

Wentworth v Gove, 45 N. H. 160.

to the town for taxes actually collected, but not for taxes, the payment of which to him was refused, on the ground that he was not authorized to collect them.¹

§ 665. **The same subject; extension of the rule to sureties of officer de facto.**—So the sureties in the official bond of an officer *de facto* are liable, precisely as if he was an officer *de jure*; and are estopped from denying the principal's title to the office, or otherwise questioning his power to act therein.²

§ 666. **Officer de facto not liable to injunction; liable to mandamus; extent of the doctrine; effect of withdrawal.**—An officer *de facto*, who has assumed the duties of the office, cannot be restrained by injunction from continuing to exercise the office.³ Such a person may be compelled to perform the duties of the office, in like manner as an officer *de jure*, and a mandamus lies against him for that purpose.⁴ But a person who is an officer *de facto*, but not *de jure*, may, at any time, withdraw entirely from the performance of the duties of the office, and is thenceforth not liable to an action by an individual, or to a statutory penalty, for any nonfeasance. But it is simply reasonable to assume, although the authorities do not so expressly declare, that, notwithstanding his withdrawal, he would be liable for whatever damages or other loss might result from his leaving, in an uncompleted state, the performance of any particular duty, which he had undertaken before such withdrawal. The principal authority on this subject is a decision of the supreme court of New York, made in 1858, in an

¹ *Lincoln v Chapin*, 132 Mass. 470.
Accord, *Billingsley v State*, 14 Md. 369.

² *Case v State*, 69 Ind. 46;
Billingsley v State, 14 Md. 369;
County Com'rs v Brisbin, 17 Minn. 451;
Longacre v State, 3 Miss. 637;
McLean v State, 8 Heisk. (Tenn.) 22;

Jones v Scanland, 6 Humph. (Tenn.) 195;

Borden v Houston, 2 Tex. 594; and other cases cited *ante*, §§ 238, *et seq.*

³ *Hagner v Heyberger*, 7 W. & S. (Pa.) 104.

⁴ *Kelly v Wimberly*, 61 Miss. 548.

See also, *Runion v Latimer*, 6 S. C. 126.

action to recover a statutory penalty, for the defendant's neglect of duty, as overseer of highways. The statute required, that a person elected to that office should, within a specified time thereafter, file a notice of his acceptance of the office, and declared that his neglect so to do should be deemed a refusal to serve. The defendant was elected overseer, at a town meeting; but failed to file any notice of acceptance. He accepted, however, the road warrant, issued by the commissioners of highways, and proceeded to act thereupon; but, about three months afterwards, he returned the road warrant to the commissioners, on the ground that he was not authorized to act; and they, after taking advice, returned it to him, and on his refusal to act further, begun this action. The court, after stating that his acceptance of the road warrant, and acting thereunder, made him the officer *de facto*, continued: "The defendant, having no lawful authority to act as overseer of highways, cannot be liable for omissions of duty. He might be liable to the penalty for not accepting the office, but not for omitting to act, when he expressly disavowed his authority, and omitted to act, because he was doubtful of his right so to do." Then, after showing that, within the authorities, he would be liable as a trespasser, if he should compel any person to work out his road tax, or otherwise enforce the payment thereof, the court held that the action could not be maintained.¹ In a similar action, it was held, in an earlier case, that the overseer of highways, who had exercised the office during the full term, was liable for the statutory penalty upon proof only that he was overseer *de facto*.²

§ 667. **The same subject; mandamus; where officer de jure is substituted.**—Where proceedings by mandamus

¹ *Bentley v Phelps*, 2/ Barb. (N. Y.) 524.

378, per Earl, J., p. 387.

Approved, *Olmsted v Dennis*, 77 N. Y.

² *Dean v Gridley*, 10 Wend. (N. Y.) 254.

had been commenced against a highway commissioner *de facto*, to compel him to lay out a road, and, pending the proceedings, he was ousted by the commissioner *de jure*; and the latter was substituted as the defendant, under a statute allowing such substitution; it was held, that the fact, that the original defendant was not the officer *de jure*, would not defeat the proceedings.¹

§ 668. **Officer de facto; criminal liability for malfeasance, etc.**—An officer *de facto* is liable to indictment and punishment, for any act of misfeasance or malfeasance in office, in like manner as if he had been the officer *de jure*.² An officer *de facto*, indicted for misconduct or negligence in office, is estopped from objecting in defence, that he was not officer *de jure*.³ So, an officer *de facto* is indictable and punishable for embezzlement;⁴ or for accepting a bribe. “It is,” said the court, in pronouncing judgment in the latter case, “difficult for us to conceive of a more evil and dangerous proposition, than that one, who intrudes into or usurps a public office, assumes its duties, and exercises its powers, can shield himself from punishment, by alleging that his crimes were only additions to his intrusions or usurpation.”⁵

¹ *People v Brown*, 47 Hun (N. Y.) 459, at p. 464.

² *Rex v Borrett*, 6 Car. & P. 124;
Fortenberry v State, 56 Miss. 286;
State v Dierberger, 90 Mo. 369;
State v McEntyre, 3 Ired. L. (N. C.) 171;
State v Cansler, 75 N. C. 442;
State v Long, 76 N. C. 254;
State v Maberry, 3 Strobbh. (S. C.) 144.

³ *People v Bunker*, 70 Cala. 212;
State v Stone, 40 Iowa, 547;
People v Church, 3 N. Y. Crim. R. 57;
 1 How. Pr. N. S. (N. Y.) 366;
Neale v Overseers, 5 Watts (Pa.) 538.

⁴ *State v Goss*, 69 Me. 22.

⁵ *Diggs v State*, 49 Ala. 311, at p. 323.

CHAPTER XXVIII

SECURITY TAKEN BY AN OFFICER UPON AN EXERCISE OF
POWER

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I. *General rules, relating to securities taken by an officer for ease and favor, or otherwise colore officii.*

§ 669. Provisions of stat. 23 Hen. VI, ch. 9.—The rules of law, relating to securities of this description, are derived from the English statute, 23 Hen. VI, ch 9. Before the enactment of that statute, a sheriff, arresting

a party in a civil action, was not obliged to take bail, unless the party sued out a writ of mainprize, upon which he might be admitted to bail; "but he" (the sheriff) "might have taken bail of his own head; and if he had not the body ready according to his return, he was amerced, as he now is, if the plaintiff does not take an assignment of the bail bond."¹ The statute, 23 Hen. VI, ch. 9, provides particularly for the taking of bail by the sheriff, or other officer making the arrest, and adds this provision: "If any sheriffs or officers aforesaid take any obligation in other form, by colour of their office, it shall be void." Many English decisions are found, especially in the earlier reports, to the effect that any security taken by an arresting officer from his prisoner, by way of bail, is void, unless it is strictly in accordance with the provisions of this statute.²

§ 670. **The same subject; American statutes.**—The prohibition, against taking securities *colore officii*, has been incorporated into the statutes of each of the states of the Union, either in the language of the statute, 23 Hen. VI, ch. 9, or, as the general rule is, in even more comprehensive language. The statute of New York on this subject, which is a fair representative of the statutes of the other states, reads as follows: "No sheriff, or other officer, shall take any bond, obligation, or security, by colour of his office, in any other case or manner, than such as are provided by law; and any such bond, obligation, or security, taken otherwise than as herein directed, shall be void."³ It would seem, from a ruling of the commission of appeals of the state of New York, that this statute

¹ Bac. Abr., tit. Sheriff, O.
See also, Com. Dig., tit. Bail, G 2, note.

² Scryven v Dyther, Cro. Eliz. 672;
Hall v Carter, 2 Mod. 304;
Rogers v Reeves, 1 T. R. (D. & E.) 418;
Fuller v Prest, 7 T. R. (D. & E.) 109;

and cases cited in Bac. Abr. and
Com. Dig., under the heads specified
in the last preceding note.

³ R. S. of N. Y., Part 3, ch. 3, tit. 2, § 59;
2 R. S., 1st ed. 286; 4 R. S., 8th ed.
2,646.

merely embodies a principle of the common law; for the rule was applied to a transaction between an officer of the United States and his subordinate. The court said: "We are reminded, on the part of the appellant, that there is no law of the United States, prohibiting the taking of this pledge, and that our statute, as to securities taken *colore officii*, is not applicable to officers of the United States. This is undoubtedly true; but the statute of our state mostly, if not to its full extent, embodies principles of the common law, and it is important in this case, only as indicating what the public policy is. My conclusion, upon this branch of the case, is based upon principles of public policy, as sanctioned by the common law, and expounded by the ablest jurists."¹

§ 671. **Extent of exception of securities allowed by law.**—The statute, as we have shown, excepts from its prohibition only securities taken "in any other case or manner, than such as provided by law." This does not mean, that in order to be valid, a security must be expressly allowed by a statute. It was said, in a decision of the court of errors of the state of New York: "The counsel for the plaintiff in error is clearly wrong, in supposing that no public officer can take a security, unless it is a security authorized by statute law. A vast number of securities are taken, by the various public officers referred to in this article of the revised statutes, which the common law considers as valid, but which are not sanctioned by any statutory enactment. The words 'color of office' necessarily imply an illegal claim of right or authority to take the security, or to do the act in question, by virtue of his office, which claim is a mere color or pretence on the part of the officer. Or, as Tomlyn expresses it, 'color of office is when an act is evilly done,

¹ Richardson v Crandall, 48 N. Y. 348,
per Earl, Com'r., p. 362. The case is

cited at length, post, § 673.

by the countenance of an officer, and is always taken in the worst sense, being grounded upon corruption, to which the office is as a mere shadow or color.' Taking a security by a public officer, *virtute officii*, implies that the act is lawful, either by the common law, or by the authority of some statute. But taking it, by color of his office, necessarily implies that the act is unlawful and unauthorized, and that the legal right to take it is a mere color or pretence."¹ Or, as was said in a later case, in the court of appeals in the same state, "where the agreement does not provide for an indemnity to the officer for a breach of duty, and does not necessarily produce an injury to the plaintiff or the defendant, and is not condemned by either the common or statute law, it cannot be held void, as taken *colore officii*."² These definitions and conclusions have been reaffirmed and applied, under the same statute, and in the same state, in several other adjudications;³ and the same result follows from the numerous adjudications, sustaining the validity of securities, taken by sheriffs and other officers exercising similar functions, in cases where no provision therefor is made by statute, cited in the subsequent portions of this chapter

§ 672. **Whether corrupt intent is necessary.**—In some of the cases, are to be found expressions, indicating that an actual corrupt intent must exist, on the part of the officer, in order to bring a security taken by him, within the statutory prohibition. Thus it was said, in an early English case, that *colore officii* "is always taken *in malam partem*, and signifies an act badly done, under the countenance of an office, and it bears a dissembling

¹ *Burrall v Acker*, 23 Wend. (N. Y.) 606, per Walworth, Ch'r.; aff'g 21 Wend. (N. Y.) 605.

² *Decker v Judson*, 16 N. Y. 439.

³ *Chamberlain v Beller*, 18 N. Y. 115; *Griffiths v Hardenbergh*, 41 N. Y. 464; *People v Lyons*, 7 Daly (N. Y.) 182; *Turner v Hadden*, 62 Barb. (N. Y.) 480.

visage of duty, and is properly called extortion." So, in an opinion delivered in the court of appeals of New York, it was said: "Color of office is a technical expression. It implies bad faith, corruption, breach of duty."¹

§ 673. **Corrupt intent; ruling in New York.**—This question was considered and passed upon, in a case in the commission of appeals of the state of New York, already cited, wherein other rulings were made upon the subject of securities taken *colore officii*; so that we will here cite the case somewhat *in extenso*. The action was brought to recover certain county bonds, and damages for the detention thereof. The defendant was a provost marshal of the United States, during the civil war, engaged in enlisting and mustering men into the service of the United States. The plaintiff's assignor was engaged in furnishing men to fill the quotas of certain towns within the defendant's district; and the defendant, before enlisting and mustering in the men so furnished, required of the plaintiff's assignor the deposit of the bonds, as security that the men would not desert, before reaching the rendezvous; and it was orally agreed, that bonds to a fixed amount, for each man so deserting, should be forfeited. In fact, several of the men deserted. The court held, that the action was maintainable. Lott, Ch. Com'r, put his opinion upon the ground, that the agreement was void under the statute of frauds, and that it was not an executed agreement. Earl, Com'r, with whom the remainder of the court agreed, said, that under the act of congress, the defendant had no duty to perform, except to determine whether the men presented were "physically or mentally unfit for service;" and that he was bound to receive all who were not so unfit; but even if he had a

¹ *Dive v Maningham*, Plowd. 60, per Montague, Ch. J.

See also, the extract from Tomlyn,

quoted in § 671, *ante*.

² *Chamberlain v Beller*, 18 N. Y. 115, per Roosevelt, J.

discretion, and could reject men because he believed that they would desert, his duty was to exercise his discretion uninfluenced by any pledge; that if the pledge had any effect, it would merely make the defendant less vigilant to prevent desertion; so that, in either aspect, the pledge was taken *colore officii*. He then proceeded to consider the question, whether a security thus taken can be condemned, unless it was corruptly taken, that is, with a corrupt and illegal intent; and, after citing and commenting upon several cases, he concluded: "I think I may safely say, that no case, entitled to weight as authority, can be found, which decides that a security taken *colore officii* cannot be condemned, unless it was taken with an evil or corrupt intent. The acts of public officers, in taking such securities, are condemned, because they are against the general policy of the law. It matters not that the motives of the officer were good and humane, if the acts are of such a character, as tend, if countenanced, to oppression or a lax performance of duty." The question was next considered, whether, as the appellant insisted, the parties were *in pari delicto*, and the contract was executed. With respect to the former proposition, he said, that the law points out the offender, and in such a case the parties are not *in pari delicto*. "The oppressor and oppressed are never upon a footing of equality." Nor was it an executed contract; as the law implies, that before a pledge can divest the pledger of the legal title, the pledge must be foreclosed. The transaction was therefore yet *in fieri*.¹

§ 674. **Application of the rule, where party under constraint.**—The primary object of the prohibition of securities, taken *colore officii*, as shown by the context of the statute in which it is found, was to prevent oppression

¹ Richardson v Crandall, 48 N. Y. 348.
Judge Earl's remarks, in answer to the suggestion that the statute does not apply to an officer of the United

States, are quoted *ante*, § 670.
See also, Cook v Freudenthal, 80 N. Y. 202, cited *post*, § 675.

by an officer of a person in his custody as a prisoner; and the courts are more strict in applying the prohibition to such cases, than to others where the party was more nearly a free agent. Thus in a case, holding that a replevin bond taken by a sheriff, with only one surety, instead of two sureties, as the statute required, was valid at the election of the other party, it was said: "Sheriffs and other officers, who take bail bonds and jail liberty bonds, are held to a strict compliance with the statutes under which those securities are taken; but for a reason which does not apply to the present case. Those bonds are executed by persons who are under legal restraint, and for the purpose of avoiding confinement within prison walls. The parties to those contracts do not stand upon equal grounds in making them. The party executing the bond is in the power of the officer; and a strict compliance with the statute is necessary, to prevent oppression and abuse of that power."¹ But this rule will not save a security, which is not in accordance with the directions of the statute, and is therefore obnoxious to the statutory prohibition, although it was not executed under any moral compulsion. In the case of such a security, *semble*, that the question is immaterial, whether it was extorted or voluntarily given, or even tendered by the party.*

§ 675. **Rule does not apply, where security given to adverse party.**—But the voluntary character of the transaction, and the fact that the party was not under moral compulsion, may have a tendency to validate a security, which is not given directly to the officer or for his bene-

¹ *Shaw v Tobias*, 3 N. Y. 188, per Ruggles, J., p. 192, following *Winter v Kinney*, 1 N. Y. 385.

See also, *Kesler v Haynes*, 6 Wend. (N. Y.) 547;

Morton v Campbell, 37 Barb. (N. Y.) 179.

² *Toles v Adea*, 84 N. Y. 222, rev'g 18 Hun (N. Y.) 46; 9 Week. Dig. (N. Y.) 211;

Haberstro v Bedford, 118 N. Y. 187, aff'g 43 Hun (N. Y.) 201.

fit; but to the party in whose favor the process was issued. Thus, in an action upon a bond, given to release from arrest a ship, which had been seized by summary proceedings under the New York statute, where the objection was, that the bond was broader than the statute prescribed, it was held that the plaintiffs were entitled to recover. Walworth, Chancellor, said: "It was not a bond taken *colore officii*, for, though taken by the officer who issued the warrant, it was not a bond to himself; but was executed to and for the benefit of the parties suing out the warrant. Nor did the variance of the condition from the terms of the statute, render the bond void. It was voluntarily executed by the obligors, and, though broader in terms, than could have been required by the obligors, the latter had no right, on that account, to object to it; nor can the former, having had the full benefit of the proceeding, complain that they had bound themselves to do what could not have been required of them."¹ So, it has been held, that although a bond to an officer for ease and favor is void, yet to render an instrument such a bond, it must be given to the arresting officer as obligee.² But an undertaking in replevin, containing a provision which the statute does not require, is void, although the officer did not intend to violate the law, since the undertaking enures to his benefit in the first place, although ultimately to the plaintiff's.³ Where a defendant, who had been arrested, was permitted to go at large, on his depositing with a stranger to the suit a sum of money, under an agreement, that if he did not surrender himself within a specified time, the money

¹ Ring v Gibbs, 26 Wend. (N. Y.) 502.

Accord, on the doctrine that the bond was saved, by not being for the benefit of the officer, McGowen v Deyo, 8 Barb. (N. Y.) 340.

See also, Franklin v Pendleton, 3

Sandf. (N. Y.) 572.

² Winthrop v Dockendorff, 3 Me. 156; Kavanagh v Saunders, 8 Me. 422; Clap v Cofran, 7 Mass. 98.

³ Cook v Freudenthal, 80 N. Y. 202, aff'g Cook v Horwitz, 14 Hun (N. Y.) 542.

should be paid to the plaintiff; in an action by him against the depositary to recover back the money, it was held, that the question for the jury was, whether the agreement was made with the officer, or with the plaintiff; if with the former, it was void, as having been taken *colore officii*; if with the latter, it was valid.¹

§ 676. **Effect of superadding provisions not required by the statute.**—Where the statute prescribes the terms of a bond, to be taken by an officer in a particular case, if he takes a bond containing all that the statute requires, and also an additional provision, the bond is void *in toto*, and the additional provision cannot be rejected, so as to allow the remainder to stand.² But where a person gives to the sheriff the statutory bond for the liberties of the jail, and, as additional security, a warrant of attorney to confess judgment, although the latter is void, *semble*, that the bond is not affected thereby.³ A bail bond in a larger sum than the order directs, is a nullity.⁴ And the transfer of a note, taken instead of a bail bond, is unlawful.⁵ In proceedings under the statute, to compel a person to support his wife and children, whom he has abandoned, if the magistrate's order requires the defendant to give a bond for their support, in the penalty of \$250, and the bond is taken by the officer in the penalty of \$500, it is void.⁶

¹ Winter v Kinney, 1 N. Y. 365.
S. P., Toles v Adeo, 84 N. Y. 222;
Goodwin v Bunzl, 102 N. Y. 224;
Carr v Sterling, 114 N. Y. 558.

² Shuttleworth v Levi, 13 Bush (Ky.) 195;
People v Meighan, 1 Hill (N. Y.) 298.
See also, Barnard v Viele, 21 Wend.
(N. Y.) 88;
Sullivan v Alexander, 19 Johns. (N. Y.) 233;
People v Locke, 3 Sandf. (N. Y.) 443;

People v Mitchell, 4 Sandf. (N. Y.) 466;
Turner v State, 14 Tex. App. 168.

Dole v Moulton, 1 Johns. Cas. (N. Y.) 129;
S. P., Richmond v Roberts, 7 Johns.
(N. Y.) 319.

⁴ Roberts v State, 34 Kan. 151.

⁵ Strong v Tompkins, 8 Johns. (N. Y.) 98.

⁶ Com'rs of Charities v Hammill, 33 Hun (N. Y.) 348.

§ 677. **Security to induce officer to violate his duty is void.**—A security, given to induce an officer to violate his duty, is void; and if it is in the form of a negotiable note, it is void in the hands of a subsequent holder, unless he is a holder *bona fide*, and before maturity.¹ So, a security given to an officer, to induce action by him, contrary to the statute, is void, irrespectively of his good faith or want of an intent to violate the law; as, for instance, where a magistrate takes a note for the fine and costs, imposed upon a person in a criminal cause, and thereupon suffers him to go at liberty.² So, a security given to the arresting officer, to deliver up a person arrested on a criminal charge, is void;³ so, if such a promise is made, upon the officer's forbearance to arrest.⁴

§ 678. **Effect of security, where officer had no power or jurisdiction; when good at common law.**—A security given to an officer, in a case where he had no power or jurisdiction, is void.⁵ But it has been held, that although an obligation, for the appearance of a person charged with a crime, taken by a magistrate who was not authorized to admit to bail, is invalid as a statutory recognizance, and cannot be enforced by statutory proceedings; yet it may be enforced by action, as a common law bond, voluntarily given, where the accused has been set at liberty upon the faith of it.⁶ And where the keeper of an arsenal, appointed by, and responsible to the commissary-general of the state, loaned, without any authority of law, and consequently in violation of his duty, certain arms and military equipments of the state to a city, taking the city's

¹ *Devlin v Brady*, 36 N. Y. 531, *aff'g* 32 Barb. (N. Y.) 518.
See also, cases under the next succeeding division of this chapter.

² *Bills v Comstock*, 12 Met. (Mass.) 468;
Kingsbury v Ellis, 4 Cush. (Mass.) 578.

³ *Churchill v Perkins*, 5 Mass. 541.

⁴ *Denny v Lincoln*, 5 Mass. 385.

⁵ *Benedict v Bray*, 2 Cala. 251;
Caffrey v Dudgeon, 38 Ind. 512.

⁶ *State v Cannon*, 34 Iowa 322.
See also, *Holbrook v Klenert*, 113 Mass. 268.

bond to the state for the return thereof; it was held, that the state might waive the unlawfulness of the act, and recover upon the bond.¹

§ 679. **Bond to pay assessments, given by persons interested in opening highway, is void.**—A bond, taken by highway commissioners, given to them by persons interested in an application for a new highway, and intended to relieve the inhabitants of the town, from the assessment for opening the highway, is void; because the commissioners have no authority thus to bargain, and are bound to decide the application, according to their opinion as to what the public interests require.²

§ 680. **Doctrine as to securities, given to arresting officer or jailor, by prisoner.**—Although, as we have already shown, the courts apply the statute against securities taken *colore officii* with special strictness, where the security is given by a person under the restraint of the officer taking the security; yet in some cases, they have allowed such securities to stand, although they were not of the character provided for by the statute, relating to taking bail. Thus, it has been held, that a bond to the sheriff, that one arrested will remain a true and faithful prisoner, given to induce a less rigorous confinement, the indulgence being such as the sheriff might grant, consistently with his duty (allowing him to go at large within the walls of the prison), was not a bond for ease and favor, under 23 Hen. VI, ch. 9, as reenacted in New York.³ So, also, it has been held that a promise to a jailor to pay him for extraordinary services, during a prisoner's sickness, which it was not the jailor's duty to render, was valid.⁴

¹ State v Buffalo, 2 Hill (N. Y.) 434.

² Dole v Bull, 2 Johns. Cas. (N. Y.) 239.

³ Webb v Albertson, 4 Barb. (N. Y.) 51.

⁴ Trundle v Riley, 17 B. Mon. (Ky.) 396.

II. Contracts to indemnify officers.

§ 681. **Such contracts not within the statute against securities colore officii.**—There is no principle better settled, than that a contract to indemnify an officer, against liability to be incurred by him, in the execution of process in his hands, is not within the prohibition against taking securities *colore officii*, provided it is taken under the circumstances and within the limits, which have been established for that purpose, by the adjudications upon the subject. The case, in which such an indemnity is most frequently given, is that where a sheriff or other similar officer, holding process against A, takes, by virtue thereof, property which really belongs to B. Such an act is a trespass, for which the officer is liable. And it would seem, upon principle, that an indemnity against the consequences of committing it would be invalid, within the rule that all contracts, having for their object the commission of an unlawful act, are void. But the doctrine, sustaining indemnities of that character, rests upon the assumption, that the officer acts in good faith, and that the question, whether his act is lawful or unlawful, depends upon facts, which he has no means of ascertaining. As was remarked by a learned judge: “The action of trespass against sheriffs, for the seizure of property in the execution of legal process, is *sui generis*. It is regarded by the law, in many instances, as a means of determining the title to property, rather than in the light of an ordinary trespass. Good faith on the part of the officer is presumed, and he may consequently require and receive indemnity, before proceeding to the final execution of the writ.”¹ And, subject to the limitations and qualifications to which we have referred, such a contract of indemnity may be taken by the officer, as he shall deem to be best adapted for his protection.²

¹ *People v Schuyler*, 4 N. Y. 173, per Gardiner, J., p. 183.

² *O'Donohue v Simmons*, 31 Hun (N. Y.) 287.

§ 682. **Validity of such contracts; extent of officer's right to indemnity.**—The rule, which extends to all cases within the general principle, as well as to those where a stranger's property is taken under process, is, that if the officer acts in good faith, and there is a room for an honest doubt, whether the facts exist, which will render unlawful the act which he is required to do, he may refuse to act, without an indemnity; and an indemnity, taken by him, against the consequences of such act, is lawful, and may be enforced by him; but if he knowingly commits a trespass, an indemnity against the same is void.¹ So, the sheriff may require an indemnity, where he is directed to serve the process in a particular manner.² But an officer cannot demand a bond, in a penalty

¹ *Arundel v Gardiner*, Cro. Jac. 652;
Blackett v Crissop, 1 Ld. Ray. 278;
Merryweather v Nixan, 8 T. R. (D. & E.) 186;
Prewitt v Garrett, 6 Ala. 128;
Collier v Windham, 27 Ala. 291;
Stark v Raney, 18 Cala. 622;
Long v Neville, 36 Cala. 455;
Hardesty v Price, 3 Colo. 556;
Porter v Stapp, 6 Colo. 32;
Stanton v McMullen, 7 Ill. App. 326;
Nelson v Cook, 17 Ill. 443;
Anderson v Farns, 7 Blackf. (Ind.) 343;
Allwein v Sprinkle, 87 Ind. 240;
Lampton v Taylor, 6 Litt. (Ky.) 273;
Davis v Tibbats, 7 J. J. Marsh, (Ky.) 264;
Board v Helm, 2 Met. (Ky.) 500;
White v Waggaman, 36 La. Ann. 984;
Gower v Emery, 18 Me. 79;
Jessop v Brown, 2 Gill & J. (Md.) 404;
Bond v Ward, 7 Mass. 123;
Marsh v Gold, 2 Pick. (Mass.) 285;
Train v Gold, 5 Pick. (Mass.) 390;
Avery v Halsey, 14 Pick. (Mass.) 174;
Foster v Clark, 19 Pick. (Mass.) 329;
Jacobs v Pollard, 10 Cush. (Mass.) 237;
Smith v Cicotte, 11 Mich. 383;
Shotwell v Hamblin, 23 Miss. 156;
Forniquet v Tegarden, 24 Miss. 96;

Moore v Allen, 25 Miss. 363;
McCartney v Shepard, 21 Mo. 573;
Smith v Osgood, 46 N. H. 178;
Coventry v Barton, 17 Johns. (N. Y.) 142;
Stone v Hooker, 9 Cow. (N. Y.) 154;
Ball v Pratt, 36 Barb. (N. Y.) 402;
People v Schuyler, 4 N. Y. 173, at p. 183;
Chamberlain v Beller, 18 N. Y. 115;
Griffiths v Hardenbergh, 41 N. Y. 464;
Ives v Jones, 3 Ired. L. (N. C.) 538;
Cumpston v Lambert, 18 Ohio 81;
Acheson v Miller, 2 Ohio St. 203;
Miller v Rhoades, 20 Ohio St. 494;
Spangler v Comm., 16 Serg. & R. (Pa.) 68;
Shriver v Harbaugh, 37 Pa. St. 399;
Patterson v Anderson, 40 Pa. St. 359;
Jamieson v Calhoun, 2 Speers (S. C.) 19;
Davis v Arledge, 3 Hill (S. C.) 170;
Adair v McDaniel, 1 Bailey (S. C.) 158;
Emory v Davis, 4 S. C. 23;
Hunter v Agee, 5 Humph. (Tenn.) 57;
Morgan v Hale, 12 W. Va. 713.
 In several of the states, the sheriff's right to indemnity, where an adverse claim is made, is regulated by statute.

² *Ranlett v Blodgett*, 17 N. H. 298.

greater than the sum necessary to secure him; and an agreement to give such a bond cannot be enforced.¹ Nor can he lawfully take an indemnity, which will give him a remedy extending beyond his own liability.² The bond of indemnity, given by a deputy sheriff to a sheriff upon the former's appointment, is not within the statutory prohibition against securities taken *colore officii*.³

§ 683. **Indemnity against future unlawful act void.**—An indemnity against the consequences of a future unlawful act by an officer is void, whether it be an act of misfeasance, as a neglect of duty;⁴ or an act of malfeasance, or violation of duty, such as making a false return;⁵ permitting a prisoner to escape;⁶ knowingly seizing exempt property;⁷ levying under an execution after the death of the judgment debtor,⁸ or selling property in violation of an order restraining him from so doing.⁹ And a promise to indemnify a sheriff, for discharging from custody, one whom he has arrested under an attachment against the person, is void, although it was induced by the promisor's representation, that the debt, to enforce the payment of which the process had been issued, was satisfied.¹⁰

§ 684. **Indemnity void, where officer no lawful power to act; or where he is protected.**—An indemnity is not valid, where the officer, to whom it was given, had no law-

¹ *Wadsworth v Walliker*, 51 Iowa 605.
Browning v Hanford, 5 Hill (N. Y. 588, per Bronson, J., p. 498.

² *Ball v Pratt*, 36 Barb. (N. Y.) 402

³ *Mott v Robbins*, 1 Hill (N. Y.) 21;
Willett v Kipp, 12 Hun (N. Y.) 474.
See also, *ante*, § 596.

⁴ *Hodsdon v Wilkins*, 7 Me. 113;
Ayer v Hutchins, 4 Mass. 370;
Churchill v Perkins, 5 Mass. 541;
Shotwell v Hamblin, 23 Miss. 156.

⁵ *Knipe v Hobart*, 1 Lutw. 593.

⁶ *Ligeart v Wiseham*, 3 Dyer, 323 (b);
Mosedel v Middleton, T. Raym. 222;
1 Vent. 237;

Martyn v Blithman, Yelv. 197;
Love v Palmer, 7 Johns. (N. Y.) 159;
Richmond v Roberts, 7 Johns. (N. Y.) 319.

⁷ *Prewitt v Garrett*, 6 Ala. 128.

⁸ *Collier v Windham*, 27 Ala. 291.

⁹ *Buffendeau v Brooks*, 28 Cal. 641.

¹⁰ *Webbers v Blunt*, 19 Wend. (N. Y.) 188.

ful authority to do the act, for which he was indemnified, as where an attachment, directed "to any constable," was received by the sheriff, who took an indemnity thereupon.¹ So, where it was given to induce the officer to forbear to levy upon exempt property.² And where, in a proceeding by attachment, an order of sale is regularly made, the sheriff cannot require an indemnity, before proceeding to execute it, although the title to the property is disputed; for he is protected by the order, and his official bond would be holden for his failure to execute it.³

§ 685. **Indemnity not construed to cover unlawful act.**—However broad and general the terms of a contract of indemnity may be, the court will not construe it, so as to include an unlawful act, if any other construction can be placed upon it. This rule was well applied, in a case in the court of appeals of the state of New York, in an action brought by a marshal of the city of New York, upon a bond of indemnity, reciting the issuing of an execution to the marshal. The bond was a printed form, filled up in writing, and the written part recited, that certain personal property, appearing to belong to the judgment debtor, was claimed by one D, and also by one H; the condition, which was printed, was to the effect, that the obligors would indemnify the marshal and his assistants, for levying and selling, under the execution, "all or any personal property, which he or they shall or may judge to belong to the said judgment debtor." It appeared that the obligors in the bond, who were also the judgment creditors, caused the execution to be delivered to the marshal, and indorsed thereupon, for his information, three addresses of the debtor, one on Sixth avenue, one on Broadway, and one on Third avenue; and that the marshal levied upon goods in the Sixth avenue store, and

¹ *Porter v Stapp*, 6 Colo. 32.

² *State v Manly*, 11 Lea (Tenn.) 636.

³ *Hennessey v Hill*, 52 Ill. 281.

also in the Broadway store, estimated to be worth twice the amount of the judgment; that the goods in the Sixth avenue store were claimed by D, and those in the Broadway store by H; whereupon the marshal notified the obligors of these claims, and required indemnity, and the bond in suit was given; that afterwards the property in the Sixth avenue store was eloigned, but that in fact it was not the property of the judgment debtor; that the judgment creditors thereupon notified the marshal, that they should hold him responsible for his levy; whereupon, without their knowledge, he levied upon the goods at the Third avenue store, and afterwards sold them, and paid over the proceeds to the obligors. The marshal having been sued, and judgment recovered against him, for the last levy and sale, by the real owner of the goods, who was not named in the recital of the bond; he brought this action. A question arose, as to whether the attorney for the judgment creditors knew of the last levy and sale; but the court deemed that question immaterial, on the ground that the attorney's authority did not extend to authorizing a trespass. On looking at the terms of the bond, regarding the written part as entitled to greater weight than the printed part, and considering the surrounding circumstances, the court held, that the evident intention of the parties was to indemnify the marshal for the levies which he had made, at the time when the bond was given; that where a bond of indemnity to an officer can be construed otherwise, it will not be construed so as "to make the obligors responsible for trespasses which they do not direct or authorize;" that in the levy upon the goods in the Third avenue store, the marshal "was acting at his own risk, for his sole benefit, and assuming a responsibility, which he well knew was beyond the purpose and intent, for which the bond was asked or given;" that he did not act on the faith of the bond, "as it is," but as he

hoped it would prove to be; and that he was therefore not entitled to recover.¹

§ 686. **Construction of indemnity upon attachment.**—In another case, in the same court, a sheriff, having levied upon goods under an attachment, received a bond of indemnity in the ordinary form, executed by persons who were not the plaintiffs in the attachment suit. Subsequently, the attachment was set aside; whereupon, under the statute, it became the duty of the sheriff to redeliver the attached property. This he refused to do, upon the demand of the general assignee of the defendant in the attachment suit, for the benefit of the latter's creditors; but he retained possession of the goods, and subsequently sold them, under an execution in the attachment suit, and paid the proceeds to the plaintiffs in that suit. It appeared, that the obligors in the bond had no knowledge of the setting aside of the attachment, or the sheriff's refusal to deliver the goods, until after the commencement of an action by the assignee against the sheriff, based upon such refusal. But, upon being notified by the sheriff, they defended that suit, the plaintiff in which recovered, on the ground that the sheriff's act was unlawful. The sheriff then commenced this action on the bond of indemnity. It was held, that he could not recover; that the bond of indemnity purported only to protect the sheriff upon the due execution of the attachment; that his refusal to surrender the property, after the attachment had been vacated, was an unlawful act, not covered by the bond, and which could not lawfully have been covered by it; that the obligors did not ratify such unlawful act, by undertaking the defence of the action against the sheriff; and that the payment to and receipt

¹ *Clark v Woodruff*, 83 N. Y. 518, aff'g 18 Hun (N. Y.) 419. The bond in this case was identical, as respects the condition, with the bond in *O'Dono-*

hue v Simmons, 31 Hun (N. Y.) 207, where its validity was recognized, the question in 83 N. Y., not having arisen in the latter case.

by the plaintiffs in the attachment suit, of the proceeds of the sale, having been made with the knowledge of their attorney whence the money proceeded, but not with their own knowledge, was not a ratification of the sheriff's unlawful act, and still less was it a ratification on the part of the indemnitors.

§ 687. Effect of indemnity against past unlawful act.—

An indemnity to an officer against his past unlawful act, if founded upon sufficient consideration, is lawful and valid;³ as, for instance, against an escape, although it was voluntary;³ or against the seizure under an execution of exempt property.⁴ And where a sheriff had sold, under an execution, goods, to which a third person laid claim, and, on being informed of the claim, refused to pay over the proceeds, unless indemnified; it was held that the indemnity was valid.⁵ And although the statute does not authorize the sheriff to take a bond of indemnity from the plaintiff, before executing a writ of replevin, such a bond is good at common law, if voluntarily given; as it does not contravene the policy of the law, and is not repugnant to any statutory provision.⁶

§ 688. Indemnity; when the law implies a promise of.—

If an officer, under an execution, or a general attachment, seizes particular property by direction of the plaintiff, the law implies a promise of indemnity; and the officer may recover thereupon, if he acted in good faith, and the property belonged to a third person, who recovers against him therefor.⁷ But an implied indemnity to the officer

¹ *Bowe v Wilkins*, 105 N. Y. 322.

Doty v Wilson, 14 Johns. (N. Y.) 378.

² *Griffiths v Hardenbergh*, 41 N. Y. 464;

⁴ *Hunter v Agee*, 5 Humph. (Tenn.) 57.

Hall v Huntoon, 17 Vt. 244;

⁵ *Westervelt v Frost*, 1 Abb. Pr. (N. Y.) 74.

Hunter v Agee, 5 Humph. (Tenn.) 57;

⁶ *Wolfe v McClure*, 79 Ill. 564.

Atkins v Johnson, 43 Vt. 78;

Kemper v Kemper, 3 Rand. (Va.) 8.

⁷ *Mullings v Bothwell*, 29 Ga. 706;

See also, *Shackell v Rosier*, 2 Bing.

Levy v Shockley, 29 Ga. 710;

N. C. 634.

Gower v Emery, 18 Me. 79;

⁸ *Given v Driggs*, 1 Cai. (N. Y.) 450;

Ranlett v Blodgett, 17 N. H. 298.

does not arise from merely delivering the writ, without special directions as to the levy,¹ nor from the fact that the judgment creditor bid in property seized by the officer unlawfully, and without his request.² Where an officer, acting under a writ of replevin in favor of a mortgagee of chattels, suffers the agent of the mortgagee to remove articles, not included in the writ, upon the agent's representation that they were included in the mortgage, this does not raise an implied promise on the part of the mortgagee, to indemnify him.³

§ 689. **Liability of indemnitors for officer's trespasses.**—Those who indemnify an officer, for seizing a stranger's property, become trespassers, and are liable accordingly to the owner of the property.⁴ But where a sheriff, having been indemnified, levied under an execution upon a safe, which in fact did not belong to the judgment debtor, and which contained merchandise belonging to a stranger; and the sheriff removed the safe, opened it, took out the merchandise, deposited the same with an auctioneer, marked with his (the sheriff's) name, and sold the safe under the execution; it was held, that as the seizure of the safe was wrongful, the seizure of its contents was also wrongful; but that the indemnitors were not liable to the owner of the merchandise, in the absence of proof that they knew that it was in the safe.⁵

¹ *Farebrother v Ansley*, 1 Campb. 343;
Wilson v Milner, 2 Campb. 452;
England v Clark, 4 Scam. (Ill.) 486
Nelson v Cook, 17 Ill. 443;
Weld v Chadbourne, 37 Me. 221;
Marshall v Hosmer, 4 Mass. 60;
Bond v Ward, 7 Mass. 123;
Averill v Williams, 1 Denio (N. Y.)
 501;
Fitler v Fossard, 7 Pa. St. 540.

² *Russell v Walker*, 150 Mass. 531.

³ *Williams v Mercer*, 139 Mass. 141.

⁴ *Luebbering v Oberkoetter*, 1 Mo. App.
 393;

Davis v Newkirk, 5 Denio (N. Y.) 92.

See also, *Chapman v O'Brien*, 39 N. Y.
 Super. Ct. 244;

McKinley v Bowe, 97 N. Y. 93.

In several of the states, provision is
 made by statute for substituting the
 indemnitors in place of the sheriff,
 in an action against the latter.

Chapman v Douglas, 5 Daly (N. Y.)
 244; 15 Abb. Pr. N. S. (N. Y.) 421.

§ 690. **Rulings upon officer's liabilities.**—After accepting an indemnity, an officer renders himself liable by releasing the property levied upon, if in fact it was subject to the levy.¹ And where the officer, having been indemnified, has sold the property levied upon, he is liable for the purchase money to the plaintiff in the process, although the defendant did not in fact own the property, and the sheriff has not received the money, having given the purchaser credit.²

§ 691. **Doctrine that indemnity covers only the due course of proceedings, according to statute.**—Where a sheriff is indemnified, upon a levy upon property, against the claim of a stranger, the indemnity covers only liabilities incurred by him in the due course of his seizing, disposing of, and applying the property, in accordance with the statute; it does not cover a loss of the property by the default, omission, or misappropriation of the sheriff or his deputy.³ But a sheriff, who has sold goods attached, and has been sued and compelled to pay a stranger having title to the goods, may recover upon his bond of indemnity, although in making the sale he did not strictly conform to the requirements of the statute, unless it is expressly shown that such failure to conform to the statute constituted the ground of the recovery against him.⁴ And a sheriff's right of action against his indemnitors on the attachment of property, is not affected by the fact, that he consented to a discontinuance of a former action to recover possession of the same property.⁵

§ 692. **Officer, to recover on bond, must comply with conditions.**—Where a bond of indemnity, given to a

¹ *Wadsworth v Walliker*, 51 Iowa 605.

² *Adams v Disston*, 44 N. J. L. 662.

³ *O'Donohue v Simmons*, 31 Hun (N. Y.) 287.

⁴ *Crossman v Owen*, 62 Me. 528.

See also, *Stanton v McMullen*, 7 Ill. App. 326.

⁵ *Bowe v Brown*, 4 N. Y. St. Rep'r. 456.

sheriff upon making a levy, contains a condition that, if the sheriff is sued, the obligors shall be notified and allowed to defend, and the sheriff fails to fulfil that condition, he cannot recover upon the bond; and the express contract prevents him from recovering, upon an implied contract, to repay the money which he has paid over, as having been collected under the execution.¹

§ 693. **Officer may take additional security.**—Where a sheriff, upon an attachment of gold coin, which was claimed by a stranger, demanded indemnity, and the plaintiff accordingly gave him a bond, and, for additional security, a consent that he might retain in his hands, for a reasonable time, any money coming into his hands by virtue of the attachment, or of an execution to be issued upon any judgment recovered in the action; and the plaintiff recovered judgment in the action, but the claimant's suit against the sheriff was still pending; it was held, that the plaintiff could not have, upon motion, an order that the sheriff pay the money into court, on the receipt of a substituted bond; but that the sheriff, under the agreement, was entitled to retain the money for a reasonable time.²

§ 694. **Upon recovery of judgment against officer, the condition of the bond is broken.**—Where a bond is given to an officer to indemnify him upon a levy, and the true owner of the goods recovers a judgment against the officer, by reason of the levy, the condition of the bond is broken, and the obligor therein is liable to the officer, although the latter has not paid the judgment.³ And in a similar case it was held, that the plaintiff in the judg-

¹ *Preston v Yates*, 24 Hun (N. Y.) 534.

See also, s. c. 17 Hun (N. Y.) 92.

² *Scherr v Little*, 60 Cal. 614.

³ *Cook v Merrifield*, 139 Mass. 139.

See also, *White v French*, 15 Gray

(Mass.) 339;

Johnson v Gilbert, 9 Hun (N. Y.) 469;

Goode v Alt, 2 N. Y. City Ct. 187;

Bancroft v Winspear, 44 Barb. (N. Y.) 209.

ment against the officer, who had discharged the judgment, upon receiving an assignment of the bond from the officer, was entitled to recover upon it; and that his release of the officer did not release the obligors in the bond.¹

§ 695. **Measure of damages in action on indemnity bond.**—In an action upon a bond of indemnity, given to a sheriff upon a levy, he is entitled to recover the amount of the judgment recovered against him by the true owner of the property, and also his reasonable expenses in defending the action in good faith.² Such expenses include reasonable counsel fees paid by him.³ And in one case it was held, that in an action upon a bond of indemnity, it was not a good defence, that the sheriff had sold property to an amount exceeding the execution, where his costs and expenses in the action by the true owner, with the damages recovered, amounted to the penalty of the bond.⁴

§ 696. **The same subject.**—In an action upon such a bond, the sheriff is entitled to recover the expenses of his successful defence in the action against him by the claimant.⁵ And it has been held, that a sheriff may recover the whole amount of the expenses of such a successful defence, not merely a proportional part, although other creditors, who did not indemnify him, received the surplus of the proceeds of the goods, after satisfying the indemnifying creditor.⁶ But a bond, conditioned to indemnify a sheriff against “costs, charges, and expenses” which he should incur in

¹ *McBeth v McIntyre*, 57 Cal. 49.
See also, *Howe v Freidheim*, 27 Minn.
294.

² *Graves v Moore*, 58 Cal. 435.

³ *Lindsey v Parker*, 142 Mass. 582.
Contra, *Brinker v Leinkauff*, 64 Miss.
235.

⁴ *Reilly v Moffat*, 20 Week. Dig. (N. Y.)
390.

⁵ *Chamberlain v Beller*, 18 N. Y. 115;
Home Ins. Comp'y v Watson, 59 N. Y.
390, rev'g 1 Hun (N. Y.) 643; 4 T. & C.
(N. Y.) 226.

⁶ *Chamberlain v Beller*, 18 N. Y. 115.

defending a suit, does not cover the damages recovered against him.¹

III. *Contracts of receiptors.*

§ 697. **Not within the statute against securities colore officii ; measure of damages.**—A contract whereby a person, on receiving property levied upon under an execution or attachment against another, agrees with the officer to deliver the property to the latter upon demand, or in default thereof, to pay the debt, is not within the statutory prohibition against securities taken *colore officii*, and may be enforced by the officer.² And where the receiptor is sued by the officer, for failure to fulfil such a contract, he cannot show, in reduction of damages, that the property was worth less than the amount of the debt.³

§ 698. **Nature of contract ; extent of liability.**—As construed by the courts, the contract of a receiptor is a peculiar one. He is the officer's bailee,⁴ and is responsible to the officer only, not to the creditor.⁵ The officer is entitled to repossess himself of the property at any time, either to sell it, or to redeliver to the judgment debtor, on payment of the execution.⁶ The receiptor may defend an action against him by the officer, upon any ground, showing that the officer is not under liability to the creditor

¹ *Scott v Tyler*, 14 Barb. (N. Y.) 202.

² *Beawfage's Case*, 10 Coke 99 b ;
Hoyt v Hudson, 12 Johns. (N. Y.) 207 ;
Burrall v Acker, 23 Wend. (N. Y.) 606,
aff'g s. c., p. r., 21 Wend. (N. Y.) 605 ;
Cornell v Dakin, 38 N. Y. 253.

³ *Cornell v Dakin*, 38 N. Y. 253.
Wakefield v Stedman, 12 Pick. (Mass.)
562.

See also, *Lyman v Lyman*, 11 Mass. 317 ;
Jewett v Torrey, 11 Mass. 219.

⁴ *Brown v Atwell*, 31 Me. 351 ;
Drew v Livermore, 40 Me. 266, at p. 269 ;
Bangs v Beacham, 68 Me. 425 ;
Wright v Dawson, 147 Mass. 384.

⁵ *Phillips v Bridge*, 11 Mass. 242, at p. 247 ;
See also, *Ladd v North*, 2 Mass. 514 ;
Blake v Shaw, 7 Mass. 505 ;
Badlam v Tucker, 1 Pick. (Mass.) 389 ;
Jewett v Torrey, 11 Mass. 219 ;
Lyman v Lyman, 11 Mass. 317.

⁶ *Burrall v Acker*, 23 Wend. (N. Y.) 606,
aff'g s. c., p. r., 21 Wend. (N. Y.) 605.

ror the property; and the officer can enforce the contract, only as far as necessary to relieve himself from liability. Thus a receiptor may successfully defend an action by the officer, where the property was taken from him by paramount title;¹ or where it was seized under an attachment, and the debtor filed his petition in insolvency, within four months after the attachment, which dissolves the attachment by statute, and the property has gone to the assignee in insolvency;² or where the debtor has been discharged under the insolvency law;³ or, in Massachusetts, if an execution is not taken out, as required by statute, within thirty days after judgment, where he has delivered the property to the debtor, but not otherwise.⁴

§ 699. **Extent of liability of sheriff and receiptor, continued.**—A sheriff, who leaves with a receiptor goods levied on by him, is liable for the loss thereof, unless it was caused by the act of God or of the public enemy;⁵ and the liability of the receiptor to the sheriff is the same.⁶ Where the receiptor had delivered to the debtor an animal, which had been levied upon, and the animal died, without fault of any one; it was held, that the receiptor was liable to the officer, and that he was not exonerated by procuring its equivalent, and offering it to the officer.⁷ A

¹ *Learned v Bryant*, 13 Mass. 224;
Denny v Willard, 11 Pick. (Mass.) 519.
 See also, *Fisher v Bartlett*, 8 Me. 122.

² *Wright v Dawson*, 147 Mass. 384. In this case the receiptor had allowed the debtor to take the property.

³ *Sprague v Wheatland*, 3 Met. (Mass.) 416;

Grant v Lyman, 4 Met. (Mass.) 470;
Andrews v Southwick, 13 Met. (Mass.) 535;
Butterfield v Converse, 10 Cush. (Mass.) 317;
Shumway v Carpenter, 13 Allen (Mass.) 68;

Lewis v Webber, 116 Mass. 450.

⁴ *Knap v Sprague*, 9 Mass. 258;
Webster v Coffin, 14 Mass. 196;
Cooper v Mowry, 16 Mass. 5;
Baker v Fuller, 21 Pick. (Mass.) 318.
 For a full discussion as to the rights and obligations of the officer and receiptor respectively, see Story on Bailments, 9th ed., §§ 124-136.

⁵ *Browning v Hanford*, 5 Denio (N. Y.) 586, s. c., below, 5 Hill (N. Y.) 588; 7 Hill (N. Y.) 120;

Cornell v Dakin, 38 N. Y. 253, at p. 259;

⁶ *Cornell v Dakin*, 38 N. Y. 253.

⁷ *Thayer v Hunt*, 2 Allen (Mass.) 449.

receiptor is not discharged, by an offer to redeliver the property to the officer, without a demand, unless the receipt so provides.¹

§ 700. **Circumstances which do not discharge receiptor.**—A receiptor is not discharged, under the poor debtor's law of Massachusetts, by a commitment of the debtor under an execution;² or by the discharge of the debtor under the United States bankruptcy law, if the lien of the attachment was such that it was not avoided, under the United States statute, by the proceedings in bankruptcy;³ or by a discharge under a state insolvent act, if the court, as the statute permits it to do, directed that the attachment should not be dissolved, but that the assignee should prosecute the attachment suit to judgment, and he has done so, and issued an execution thereupon;⁴ or by a delay to enforce the receipt for a considerable time after judgment, pursuant to a stipulation to that effect between the parties;⁵ or by the fact that the sheriff holds an execution against the judgment creditor, in favor of the judgment debtor, and that he has been required to set off one against the other;⁶ or by a judgment in favor of the creditor, against the debtor and his surety, upon a bond for the liberties of the jail.⁷

§ 701. **Rule where the property was exempt; where attachment was against a member of an insolvent firm.**—Where the property, for which a receipt was given, had been actually taken by the officer from the debtor's possession, the receiptor cannot, in defence of an action by

¹ Rowland v Cooper, 16 Gray (Mass.) 53;
Scott v Whittemore, 29 N. H. 309.

Tracy v Preble, 117 Mass. 4.

² Lyman v Lyman, 11 Mass. 317;
Bailey v Jewett, 14 Mass. 155;
Twining v Foot, 5 Cush. (Mass.) 512.
See also, Murray v Shearer, 7 Cush.
(Mass.) 333;

³ Ives v Sturgis, 12 Met. (Mass.) 462.

⁴ Parker v Warren, 2 Allen (Mass.) 187.

⁵ Ives v Hamlin, 5 Cush. (Mass.) 534.

⁶ Jenney v Rodman, 16 Mass. 464.

⁷ Twining v Foot, 5 Cush. (Mass.) 512.

Moore v Loring, 106 Mass. 455;

the officer, show that the property was exempt; but that fact is a defence, where the property was receipted for, without having been taken from the possession of the debtor.¹ Where, in an action against one of the members of a partnership, the goods of the partnership were attached, a receiptor therefor may, in defence of an action by the officer, show that the partnership was insolvent, and that, soon afterwards, the members of it went into bankruptcy, and obtained their discharge.²

§ 702. **Doctrine as to receiptor being estopped to claim property in the goods.**—It has been held, in New York, that a receiptor to an officer for property seized by the latter, under an execution or an attachment, is estopped from setting up, in an action by the officer for failure to deliver the property, that the property was in fact his own, or that of any other person than the debtor; and this rule has been established, without reference to the presence or absence, in the receiptor's contract, of an agreement to pay the debt, in case of failure to deliver the property.³ In Massachusetts, the courts have held, that where there is an express agreement to pay the debt, in case of failure to deliver the property, such an agreement may be enforced, although the attached property did not belong to the debtor, and perished before judgment was recovered;⁴ and that the rule is the same, where either the form of the receipt, or the circumstances under which it was given, import that it was an absolute assurance for a certain amount or value of attachable property;⁵ but that the receipt itself does not

¹ *Smith v Cudworth*, 24 Pick. (Mass.) 196;

Thayer v Hunt, 2 Allen (Mass.) 449.

² *Lewis v Webber*, 116 Mass. 450.

³ *Dezell v Odell*, 3 Hill (N. Y.) 215;
Cornell v Dakin, 38 N. Y. 253.

⁴ *Hayes v Kyle*, 8 Allen (Mass.) 300.

⁵ *Dewey v Field*, 4 Met. (Mass.) 381;

Bacon v Daniels, 116 Mass. 474.

See, however, *Wentworth v Leonard*,
4 Cush. (Mass.) 414;

Thayer v Hunt, 2 Allen (Mass.) 449;

Robinson v Mansfield, 13 Pick. (Mass.)
139;

Bursley v Hamilton, 15 Pick. (Mass.) 40.

estop the receiptor from showing, in defence of an action by the officer, that the goods were his own property, or that of a third person who had reclaimed them.¹ And where the receiptor has delivered the goods to the officer, according to his contract, he is not estopped by his receipt from maintaining an action against the officer, in replevin, trespass, or otherwise, claiming title in himself.²

§ 703. **Officer estopped to show goods were not the debtor's.**—It has also been ruled, in New York, that the estoppel, in favor of the officer against the receiptor, enures to the benefit of the plaintiff in the action, wherein the attachment or execution was issued. So that, where a sheriff, who had levied under an execution upon goods, left them with a person other than the judgment debtor, who gave him a receipt therefor, with a promise to deliver them, or in default thereof to pay the judgment, with interest and the sheriff's fees; and, on his failure to deliver them, the sheriff sued him, and recovered a judgment against him, but was unable to collect the same; it was held, in an action upon the sheriff's official bond, brought for the benefit of the judgment creditor, that the sheriff was estopped from showing that the goods were not in fact the judgment debtor's property.³

§ 704. **Doctrine as to receiptor's lien.**—It has been held, that a receiptor has a lien upon the property held by him, for his just and lawful charges as such receiptor. And where a constable, under an execution issued by a justice of the peace, levied upon property, and delivered the same to a receiptor, but the sale thereof was stayed upon

¹ *Learned v Bryant*, 13 Mass. 224;
Burt v Perkins, 9 Gray (Mass.) 317.
Edmunds v Hill, 133 Mass. 445.

Robinson v Mansfield, 13 Pick. (Mass.) 139.

³ *People v Reeder*, 25 N. Y. 302.

² *Johns v Church*, 12 Pick. (Mass.) 557;

See also, *Penobscot Boom Corp'n v Wilkins*, 27 Me. 345.

an appeal from the judgment to the county court; and upon the appeal, the judgment was affirmed; and an execution was issued upon the judgment of the county court, to the sheriff, which execution was satisfied by payment of the amount thereof to the sheriff; it was held, that the receiptor was not liable to the judgment debtors, in an action for conversion, based upon a demand of the property, and the receiptor's refusal to surrender the same, until payment of the constable's fees, and his own charges for keeping the property.¹ Where property is attached in the hands of a third person, who has a lien upon it, and he receipts for it, upon an agreement that he shall continue to retain it for his own lien; and afterwards he causes the same property to be attached, in a suit commenced by himself, and again receipts for it, still asserting his lien; the lien is not discharged.²

§ 705. **Irregularities, which do not discharge the receiptor.**—A receiptor is liable, although the officer did not return the precept into the court, until after the first day of the term, and after the cause had been removed to the United States circuit court.³ He is liable, although the action in which the property was attached was abandoned, and the goods were afterwards taken from him, upon another attachment against the owner.⁴ Where the receiptor takes the property into another state, and procures it to be attached there, in a suit brought there for the same debt, and between the same parties, in which judgment is recovered, and an execution thereupon is issued and the property sold under the execution, whereupon the action in which the receipt was given, is abandoned; he is not liable in trover, to the owner of the property.⁵

¹ *Aliger v Keeler*, 8 Hun (N. Y.) 125.

³ *Nims v Spurr*, 138 Mass. 209.

² *Townsend v Newell*, 14 Pick. (Mass.) 332.

⁴ *Whittier v Smith*, 11 Mass. 211.

⁵ *Chase v Andrews*, 6 Cush. (Mass.) 114.

§ 706. **Necessity of demand, to render receiptor liable.**—

When the receiptor's contract is, that he will deliver the property on demand, and, if no demand is made, he will deliver it within thirty days after judgment, at a certain place, he is liable, at the expiration of the thirty days, without a special demand.¹ Where it is to deliver generally, or on demand, a special demand is necessary, unless he has suffered the debtor to send the goods out of the jurisdiction, or has otherwise disabled himself from performance, in which case, *semble*, no demand is necessary.² In certain special cases, it has been held, in Massachusetts, that a demand is sufficient, although it was not personally made.³ If no demand is made upon the receiptor, during the life of the execution, he is discharged from liability to the officer, and bound to return the property to the debtor.⁴

¹ *Wentworth v Leonard*, 4 Cush. (Mass.)

414;

Hodskin v Cox, 7 Cush. (Mass.) 471.

² *Webster v Coffin*, 14 Mass. 196;

Baker v Fuller, 21 Pick. (Mass.) 318.

Mason v Briggs, 16 Mass. 453;

Moore v Fargo, 112 Mass. 254.

⁴ *Dewey v Fay*, 34 Vt. 138.

BOOK VI

JUDICIAL PROCEEDINGS RELATING TO PUBLIC OFFICES AND OFFICERS

CHAPTER XXIX

ACTION AT LAW BY OR AGAINST AN OFFICER

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I. *General rules, respecting an officer's liability to, or immunity from, a private action sounding in tort.*

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upon some duty, owing to the plaintiff by the officer, which the latter has violated, whereby the plaintiff has sustained a special damage.¹ And one cannot maintain an action against even a ministerial officer, for a neglect of duty, unless that duty was owing to him. Thus, where A, having applied to B for a loan on a bond and mortgage, was informed by the latter that he could have the money, if the title to the property was clear, whereupon his attorney, at his expense, ordered a search from the recording officer, who returned the same to the attorney, with the omission of any reference to a deed from A to another person; whereupon B loaned the money upon a mortgage, which proved to be uncollectible, by reason of the former deed; it was held that B could not maintain an action against the officer for the negligence, inasmuch the latter owed no duty to B, but only to A.²

§ 708. **No private action for breach of duty to the public.**—So, a private action cannot be sustained, for failure to discharge a duty owing exclusively to the public, even by a person specially injured thereby.³ Or, as a learned and distinguished writer gives the rule, where a duty neglected or improperly performed “is a public duty exclusively, and no single individual of the public can be, in any degree, legally concerned with the manner of its performance,” a private action will not lie; for “no man can have any ground for a private action,

¹ *State v Harris*, 89 Ind. 363; ✓
Butler v Kent, 19 Johns. (N. Y.) 223.
 See also, *Eslava v Jones*, 83 Ala. 139;
Harrington v Ward, 9 Mass. 251;
Raynsford v Phelps, 43 Mich. 342;
Moss v Cummings, 44 Mich. 359;
Bank of Rome v Mott, 17 Wend. (N. Y.)
 554.

² *Day v Reynolds*, 23 Hun (N. Y.) 131.
 See also, *Ware v Brown*, 2 Bond (U. S.)
 267;

Smith v Holmes, 54 Mich. 104;
Wood v Ruland, 10 Mo. 143;
Morange v Mix, 44 N. Y. 315;
McCaraher v Comm., 5 Watts & S.,
 (Pa.) 21;
Ziegler v Comm., 12 Pa. St. 227;
Houseman v Girard, etc., Ass'n, 81 Pa.
 St. 256.

³ *Held v Bagwell*, 58 Iowa 139.
 See also, cases cited in the following
 sections.

until some duty owing to him has been neglected, and if the officer owed him no duty, no foundation can exist, upon which to support his action.”¹ Thus, where an action was brought, by the publishers of a newspaper against a postmaster, for failure to give them the publication of the list of letters uncalled for, they having offered him proofs that their paper had the largest circulation, and the act of congress requiring that the list be published in the paper having the largest circulation; it was held, by the supreme court of New York, that the action would not lie, on the ground that the duty was imposed upon the postmaster, in order to give the widest possible notice of the unclaimed letters, and thus to benefit those to whom they were addressed, and to secure the greatest amount of revenue to the post office department, and not to benefit the publishers of the newspaper; so that the plaintiffs “had no such interest” in the performance of the duty “as gives a right of action. As connected with their paper, they were not within the purview of the statute, except incidentally. It secured to them no fixed and absolute right, and imposed upon them no duty whatever.”² In a subsequent case, decided by the court of appeals of the same state, the complaint alleged that the defendants, the aldermen of a city, the charter of which required that certain work should be awarded to the lowest bidder, advertised for sealed proposals for doing the work, and that the plaintiff was the lowest bidder for doing the work; but the defendants gave it to another bidder, at a considerably higher price. Upon a demurrer to the complaint, it was adjudged that the action could not be maintained. Danforth, J., delivering the opinion of the court, after adverting to the doctrine, that a public officer is not responsible in a civil action for an erroneous judicial determination, and stating that this was a deter-

¹ Cooley on Torts, 2d ed. 446 (*379).

² Strong v Campbell, 11 Barb. (N. Y.) 135.

mination of that character, to be followed by the ministerial duty of executing the contract, continued: "Moreover, the statute merely provides a scheme for the prudent administration of the affairs of the city, and has imposed a duty upon the defendants to carry it out. This duty appears, from the plaintiff's showing, to have been violated. But the duty is a public duty to the city or people at large, not to the plaintiff or for the benefit of individuals, or the promotion of any private interest; nor has the statute given to the plaintiff or any person an action for its violation."¹ Other cases, declaring and illustrating the same rule, will be found in the succeeding sections, and in the note subjoined.²

§ 709. **No liability for legislative action.**—Upon this principle, it has been well said by the writer already quoted, that a private action will not lie against a member of a legislative body, for any act or omission in the discharge of his legislative functions, because the members of such bodies "are not chosen to perform duties to individuals, but duties to the state. The performance of these may benefit individuals, and the failure to perform them may prejudice individuals, but this is only incidental."³ To which it may be added, that the immunity of members of a legislative body from private prosecutions is required by public policy, for if they were liable to such prosecutions, that would impair their independence, and the free exercise of their judgment, respecting such measures as the public interests require. On both grounds the rule is well settled, that they are exempt from such prosecutions, even though malice towards the particular individual aggrieved is charged; and that the immunity

¹ *East River Gas Light Comp'y v Donnelly*, 93 N. Y. 557, aff'g 25 Hun (N. Y.) 614.

Butler v Kent, 19 Johns. (N. Y.) 223; *Martin v Mayor, etc.*, 1 Hill (N. Y.) 545; *Moss v Cummings*, 44 Mich. 359.

² *Ashby v White*, 1 Salk. 19; s. c. less perfectly, 2 Ld. Raym. 938; 6 Mod. 45;

³ *Cooley on Torts*, 2d ed. 447 (*380).

includes not only members of the national and state legislatures, but members of all public bodies, such as boards of supervisors, county commissioners, chosen freeholders, city councils, and the like, which possess and exercise legislative functions, for any municipal body, or any district, or other political division.¹ But this immunity is confined strictly to the exercise of legislative functions. It often happens that bodies possessing powers of local legislation, also exercise ministerial functions. With respect to the latter, the members are liable in the same manner as other officers, performing ministerial acts, as judicial officers are under like circumstances.²

§ 710. **The same subject; constitutional exceptions.**—The constitution of the United States provides that the senators and representatives “shall, in all cases, except treason, felony and breach of the peace, be privileged from arrest during their attendance at the session of their respective houses, and in going to and returning from the same; and for any speech or debate in either house they shall not be questioned in any other place.”³ A similar provision, respecting members of the state legislature, is to be found in the constitution of each of the states; and in some of them, additional privileges, such as exemption from the service of civil process, are granted to the members of the legislature. The application and effect of such provisions belong to the subject of constitutional law.

§ 711. **The rule as respects political officers.**—It has also been said, by some writers, and held in some adjudica-

¹ *Baker v State*, 27 Ind. 485;
Co. Com'rs v Duckett, 20 Md. 468;
Wilson v Mayor, etc., 1 Denio (N. Y.)
 595, cited *ante*, § 534;
Martin v Mayor, etc., 1 Hill (N. Y.) 545.
 See also, *Ferguson v Kinnoull, Earl of*,
 9 Cl. & Fin. 251.

That the motives of members of a legislative body cannot be inquired into, to impeach their acts, see *Freeport v Marks*, 59 Pa. St. 253.

² See *post*, §§ 727, 736, 737.

³ U. S. Const'n, Art. 1, § 6.

tions, that political officers owe duties, in the exercise of their trusts, to the public only, and are consequently not answerable to individuals for a failure to perform, or for a negligent performance of, such duties, at least where no corruption or malice is imputable, and they keep strictly within the limit of their powers; and that such officers, exercising the governmental power of the state, and representing its sovereignty, enjoy the same immunity as the state, from private prosecution for a neglect to exercise such powers, as well as for the consequences of a lawful exercise of them.¹ The supreme court of the United States has, in a case which was cited in a former chapter, disclaimed all jurisdiction over a private action against the president of the United States for his official conduct.² And, in some instances, a similar disclaimer has been made, with respect to the heads of departments, in matters resting within their judgment and discretion.³ So the governor of a state is, it has also been said, exempt from a review of his action by the courts, on the ground that the executive department cannot constitutionally be subordinated to the judicial department.⁴

§ 712. **The rule as to the liability of executive officers.**—It is admitted, however, that executive officers, other than the president and the governor, are liable to private actions for misconduct in the discharge of ministerial duties confined to them.⁵ And in a subsequent chapter,

¹ Shearman & Redf. on Negl., 4th ed., 302, citing *Buron v Denman*, 2 Exch. 167;

Att'y Gen'l v Brown, 1 Wis. 513, at p. 523.

Also *Sutherland v Murray*, cited in *Johnstone v Sutton*, 1 T. R. (D. & E.) 538, wherein it was held, that an action on the case lies against a colonial governor, for maliciously suspending the plaintiff from his office. But see *Mostyn v Fabrigas*, 1 Cowp. 161.

² *Marbury v Madison*, 1 Cranch (U. S.) 137, per Marshall, Ch. J., pp. 166-170.

³ *Decatur v Paulding*, 14 Pet. (U. S.) 497; *United States v Commissioner*, 5 Wall. (U. S.) 563.

⁴ *Cooley on Torts*, 2d ed. 444 (*377).

⁵ Shearman & Redf. on Negl., 4th ed. §§ 252, 253, citing *Adsit v Brady*, 4 Hill (N. Y.) 630; *Stack v Bangs*, 6 Lans. (N. Y.) 262; *Hutson v Mayor, etc.*, 9 N. Y. 163; *Robinson v Chamberlain*, 34 N. Y. 389;

cases will be cited, where the action of the principal state or executive officers has been controlled by mandamus and certiorari.¹ Whether the action of the governor of a state can be controlled or reviewed by the courts in any case, is, perhaps, an open question, upon which the weight of authority appears to be upon the affirmative side;² and no case has yet arisen, as far as the author's examination has enabled him to discover, in which the question, whether a mandamus, or certiorari, or prohibition, will run against the president of the United States, has been presented directly for decision. With respect to the right to maintain a private action, against either the president or the governor of a state, the character of their powers and duties is such, that it is almost impossible to conceive a case, where such an action will lie, consistently with the rule, exempting an officer from such an action, for a judicial act or a *quasi* judicial act, that is, one which rests in his judgment or discretion; but if such a case should arise, it would probably be governed, in this respect, by the rules which govern the granting of a mandamus, certiorari, or prohibition. Indeed, as we have said before, the class of political, executive, or administrative officers, is very loosely defined; and it may be doubted, whether any practical benefit results, from specially distinguishing it from the judicial and ministerial classes.

§ 713. No liability for judicial or quasi judicial act.—With respect to the liability to a private action of an officer performing a judicial or *quasi* judicial³ act, in a

Fulton Fire Ins. Comp'y v Baldwin, 37 N. Y. 648;

Hover v Barkhoof, 44 N. Y. 113;

Johnson v Belden, 2 Lans. (N. Y.) 433; aff'd 47 N. Y. 130;

Conroy v Gale, 47 N. Y. 665, aff'g 5 Lans. (N. Y.) 344.

See also, Brewer v Watson, 65 Ala. 88.

¹ Post, ch. 31.

² Post, §§ 795, et seq.

³ See the definition of this expression, ante, § 533 and note.

case where he has jurisdiction, the rule is forcibly and correctly stated by a distinguished judge, in an opinion cited in a previous chapter, as follows: "No action lies in any case for misconduct or delinquency, however gross, in the performance of judicial duties. And although the officer may not in strictness be a judge, still, if his powers are discretionary, to be exerted or withheld according to his own view of what is necessary and proper, they are in their nature judicial, and he is exempt from all responsibility by action, for the motives which influence him, and the manner in which such duties are performed. If corrupt, he may be impeached or indicted; but the law will not tolerate an action, to redress the individual wrong which may have been done."¹ This general rule has been declared and applied, in a great number of cases, in England and the United States, as applicable to all judicial acts, by officers of whatever degree.² The reason for this immunity, as applied to a

¹ Per Beardsley, J., in *Wilson v Mayor*, etc., 1 Denio (N. Y.) 595, cited *ante*, § 534.

² Year Book; 9 Hen. VI, 60 pl. 9; 9 Edw. IV, 3 pl. 10; 21 Edw. IV, 67 pl. 49; *Floyd v Barker*, 12 Coke 23; *Hamond v Howell*, 1 Mod. 184; 2 Mod. 218; *Gwinne v Pool*, Lutw. 290; *Miller v Seare*, 2 W. Blackst. 1,141; *Aire v Sedgwick*, 2 Rolle 197; *Beaurain v Scott*, 3 Campb. 388; *Mostyn v Fabrigas*, 1 Cowp. 161; *Kemp v Neville*, 10 C. B., N. S. 523; 31 L. J., C. P. 158; 7 Jur., N. S. 913; 4 L. T. 640; s. c., *sub alt. nom.*, 10 W. R. 6; *Garnett v Ferrand*, 6 Barn. & Cr. 611; *Fray v Blackburn*, 3 Best & Smith 576; *Doswell v Impey*, 1 Barn. & Cr. 169; *Ackerley v Parkinson*, 3 Maule & S. 411; *Houlden v Smith*, 14 Q. B. 841; 19 L. J., Q. B. 170; 14 Jur. 598; *Dicas v Brougham* (Lord), 6 C. & P. 249;

Ward v Freeman, 2 Ir. C. L. R. 460; *Busteed v Parsons*, 54 Ala. 393; *Irion v Lewis*, 56 Ala. 190; *Woodruff v Stewart*, 63 Ala. 206; *Borden v State*, 11 Ark. 519; *Pickett v Wallace*, 57 Cal. 555; *Hughes v McCoy*, 11 Colo. 591; *Phelps v Sill*, 1 Day (Conn.) 315; *Bailey v Wiggins*, 5 Harringt. (Del.) 462; *Pruden v Love*, 67 Ga. 190; *Taylor v Moffatt*, 2 Blackf. (Ind.) 305; *Spitznogle v Ward*, 64 Ind. 30; *Elmore v Overton*, 104 Ind. 548; *Downing v Herrick*, 47 Me. 462; *Pratt v Gardner*, 2 Cush. (Mass.) 63; *Chickering v Robinson*, 3 Cush. (Mass.) 543; *Piper v Pearson*, 2 Gray (Mass.) 120; *Way v Townsend*, 4 Allen (Mass.) 114; *Fisher v Deans*, 107 Mass. 118; *Hoosac Tunnel D. & E. Comp'y v O'Brien*, 137 Mass. 424; *White v Morse*, 139 Mass. 162;

judge of a court, has been thus stated: "Courts are created on public grounds; they are to do justice as between suitors, to the end that peace and order may prevail in the political society, and that rights may be protected and preserved. The duty is public, and the end to be accomplished is public; the individual advantage

- Wall v Trumbull*, 16 Mich. 228;
Stone v Graves, 8 Mo. 148;
Edwards v Ferguson, 73 Mo. 686;
Waldron v Berry, 51 N. H. 136;
Mangold v Thorpe, 33 N. J. L. 134
Seaman v Patten, 2 Caines (N. Y.) 312;
Vanderheyden v Young, 11 Johns. (N. Y.) 150;
Butler v Potter, 17 Johns. (N. Y.) 145;
Cunningham v Bucklin, 8 Cow. (N. Y.) 178;
Weaver v Devendorf, 3 Denio (N. Y.) 117;
Brown v Smith, 24 Barb. (N. Y.) 419;
People v Stocking, 50 Barb. (N. Y.) 573;
Fvarts v Kiehl, 102 N. Y. 296;
Kennedy v Barnett, 64 Pa. St. 141;
Lining v Benthams, 2 Bay (S. C.) 1;
Brodie v Rutledge, 2 Bay (S. C.) 69;
McCall v Cohen, 16 S. C. 445;
Rains v Simpson, 50 Tex. 495;
Gould v Hammond, 1 McAllist. (U. S.) 235;
Allen v Blunt, 3 Story (U. S.) 742;
Martin v Mott, 12 Wheat. (U. S.) 19;
Johnston v Moorman, 80 Va. 131;
State v Campbell, 2 Tyler (Vt.) 177;
Kibling v Clark, 53 Vt. 379;
Carter v Dow, 16 Wis. 298.
 See also, substantially recognizing the rule, but in some cases, with qualifications hereafter to be considered:
Hamilton v Williams, 26 Ala. 527;
Craig v Burnett, 32 Ala. 728;
Heard v Harris, 68 Ala. 43;
Grider v Tally, 77 Ala. 422;
Porter v Haight, 45 Cala. 631;
Tracy v Williams, 4 Conn. 107;
Holcomb v Cornish, 8 Conn. 375;
Garfield v Douglass, 22 Ill. 100;
Barkeloo v Randall, 4 Blackf. (Ind.) 476;
Walker v Hallock, 32 Ind. 239;
Londegan v Hammer, 30 Iowa 508;
Jones v Brown, 54 Iowa 74;
Clark v Spicer, 6 Kan. 440;
Connelly v Woods, 31 Kan. 359;
Walker v Floyd, 4 Bibb (Ky.) 237;
Bullitt v Clement, 16 B. Mon. (Ky.) 193;
Morgan v Dudley, 18 B. Mon. (Ky.) 693;
Revill v Pettit, 3 Met. (Ky.) 314;
Terrail v Tinney, 20 La. Ann. 444;
Spencer v Perry, 17 Me. 413;
Morrison v McDonald, 21 Me. 550
Clarke v May, 2 Gray (Mass.) 410;
Ela v Smith, 5 Gray (Mass.) 121;
Ampers v Winslow, 75 Mich. 234;
Stewart v Cooley, 23 Minn. 347;
Wilcox v Williamson, 61 Miss. 310;
Bell v McKinney, 63 Miss. 187;
Wertheimer v Howard, 30 Mo. 420;
Evans v Foster, 1 N. H. 374;
Burnham v Stevens, 33 N. H. 247;
Jordan v Hanson, 49 N. H. 199;
Little v Moore, 4 N. J. L. 74;
Taylor v Doremus, 16 N. J. L. 473;
Morris v Carey, 27 N. J. L. 377;
Tompkins v Sands, 8 Wend. (N. Y.) 462;
Clark v Holdridge, 58 Barb. (N. Y.) 61;
Ramsey v Riley, 13 Ohio 157;
Truesdell v Combs, 33 Ohio St. 186;
Randall v Brigham, 7 Wall. (U. S.) 523;
Fuller v Gould, 20 Vt. 643;
Steele v Dunham, 26 Wis. 393; and the other cases hereinafter cited. Of course, the rule does not apply to cases, where a judicial officer is expressly made liable by statute to a private action. See *Comm. v Netherland*, 87 Ky. 195.

or loss results from the proper and thorough, or improper and imperfect, performance of a duty, for which his " (the individual's) " controversy is only the occasion. The judge performs his duty to the public, by doing justice between individuals, or, if he fails to do justice as between individuals, he may be called to account by the state, in such form and before such tribunal, as the law may have provided. But as the duty neglected is not a duty to the individual, civil redress, as for an individual injury, is not admissible." ¹ These reasons are applicable to every case, where judgment and discretion are confided to a public officer, even, although in a less degree, where the parties have themselves created a tribunal, as in the case of arbitrators, etc. But considerations of public policy also furnish additional reasons for the rule, since the liability to a private action might well prevent the judicial or *quasi* judicial officer, from giving his entire time and attention to the discharge of his public duties, interfere with his independence, lower his dignity, increase litigation, etc.² We will presently examine the question whether this rule is subject to any exceptions.

§ 714. **Rule extends to cases involving a statutory penalty ; habeas corpus.**—The immunity from a private action has been extended, even to a case, where a statutory penalty for a specific act was given to the aggrieved party. Thus, in a case which arose in New York in the year 1810, an action was brought against the chancellor of the state, to recover the penalty, given to the person aggrieved, for recommitting and reimprisoning one, who had been discharged upon habeas corpus. The plaintiff, one of the officers of the court of chancery, was committed by the chancellor for contempt and malpractice;

¹ Cooley on Torts, 2d ed. 448 (*380).

See also, Bishop on Non Contract Law, § 782.

(*406-409) ;

Bradley v Fisher, 13 Wall. (U. S.) 335, per Field, J., pp. 347-349.

² See Cooley on Torts, 2d ed. 474-477

whereupon he sued out a writ of habeas corpus, returnable before one of the justices of the supreme court, who discharged him; and the chancellor recommitted him. It was held by the supreme court, and also by the court of errors, that the action would not lie, because "a judge of a court of record is not liable to answer personally in a civil suit, for any act done by him in his judicial capacity, nor for errors of judgment;" very able opinions, sustaining this conclusion, having been delivered by Kent, Ch. J., in the supreme court, and by Platt, senator, in the court of errors.¹

§ 715. **Application of the rule to quasi judicial officers.**—

A few instances of the application of the rule to *quasi* judicial officers will be given here. In an action for false imprisonment, the defence was, that the defendants, as censors of a college of physicians, had, by the charter of the college, power to make by-laws for the government of all practioners of medicine in London, and to punish malpractice by fine and imprisonment; that the plaintiff was such a practitioner; and that the defendants, in the exercise of that power, had adjudged the plaintiff to be guilty of malpractice, and fined him £20, and ordered him to be imprisoned for twelve months, *nisi*, etc. And it was held, that inasmuch as the defendants had jurisdiction over the person of the plaintiff, he being a practitioner in London, and over the subject matter, namely, the real practice; and had power to hear and punish, and to fine and imprison; they were judges of record, and were therefore not liable to an action for the fining and imprisonment." The subject was fully considered, and all the American cases to the time of the decision (1871) were examined and commented upon, by Sargent, J., in a case in the supreme judicial court of

¹ *Yates v Lansing*, 5 Johns. (N. Y.) 282; s. c. in error, 9 Johns. (N. Y.) 395.

² *Groenvelt v Burwell*, 1 Ld. Ray. 454; 12 Mod. 386; 1 Salk. 396.

New Hampshire, wherein it was held, that highway surveyors and other town officers are not liable to civil actions for damages, for acts requiring the exercise of discretion and judgment in the discharge of their official duties, as long as they act in good faith, and within the scope of their authority; but that they are so liable for damages done to individuals by their wanton, malicious, or fraudulent acts, and for acts beyond their jurisdiction; that the only question in such cases is, did the officer in good faith perform the act, in the discharge of his duty, according to the best of his ability; and that he is the sole judge of what is reasonable and proper, both as to the act to be done, and as to the manner of its performance.¹ So, the mayor of a city, in whom judicial functions are vested by statute, who tried, convicted, and fined a person, and imprisoned him for nonpayment of the fine, where, in that particular case, he had only authority to act as conservator of the peace, and bind the party over; is not liable in damages, he having acted in good faith.² So, the members of a common council of a city are not liable to an action, for the exercise of *quasi* judicial power vested in them;³ nor are supervisors liable for their decision upon claims against the county;⁴ nor are members of a board of pilot commissioners liable to an action, brought by a pilot, for erroneously revoking his license.⁵

§ 716. **Rule extends to arbitrators.**—Mention has been made of the immunity of arbitrators, who, inasmuch as they constitute a tribunal selected by the parties, might, perhaps, be thought to constitute an exception to the general rule. But the courts have uniformly held, that inasmuch as arbitrators act judicially, they enjoy the

¹ *Waldron v Berry*, 51 N. H. 136. For other rulings, specially applicable to highway officers, see *post*, §§ 736, 737.

² *Bell v McKinney*, 63 Miss. 187.

³ *Walker v Hallock*, 32 Ind. 239.

⁴ *Wall v Trumbull*, 16 Mich. 228.

⁵ *Downer v Lent*, 6 Cal. 94.

immunity of other judicial officers, and an action will not lie against them, even for fraud and corruption in making their award.¹

§ 717. **Act must have been within officer's jurisdiction.**—In giving the rule, we have stated, that in order to entitle an officer to immunity from a private action, for his judicial or *quasi* judicial act, the act must have been within his jurisdiction. Whether this statement requires any qualification, and if so, whether it should be narrowed or widened, is a question of no little difficulty, and upon which the cases are not entirely harmonious. Evidently, where an officer acts without any jurisdiction, he is a mere intruder or trespasser, whether his action purports to be ministerial or judicial. But there are many cases, which lie close to the border line, and where the question is complicated by the consideration, that the officer's decision, that he has jurisdiction, may be one of the very judicial acts, with respect to which the rule protects him. These cases usually arise in some controversy, respecting the action of a judge of an inferior court, or an officer who possesses special and inferior jurisdiction. But they sometimes arise, where the action of a judge of a superior court is called in question.

§ 718. **The same subject; ruling of U. S. supreme court.**—In a case, where the general question of liability for judicial acts was very elaborately discussed, the supreme court of the United States held, that judges of courts of record, of superior or general jurisdiction, are not liable to civil actions for their judicial acts, even where such acts are in excess of their jurisdiction, and are alleged to have been done maliciously or corruptly; that a distinction exists, as to their liability, between

¹ *Pappa v Rose*, 7 L. R., C. P. 32, 525;
Tharsis Sulphur & C. Comp'y v Loftus, 8 L. R., C. P. 1;
Phelps v Dolan, 75 Ill. 90;

Jones v Brown, 54 Iowa 74;
Hoosac T., etc., Comp'y v O'Brien, 137 Mass. 424.

acts in excess of their jurisdiction, and acts done in the clear absence of all jurisdiction over the subject matter.¹ Evidently, however, it is necessary also that the judge should have jurisdiction of the person or the party aggrieved.

§ 719. **The same subject ; ruling in New York : Lange v. Benedict.**—This entire subject was fully considered by the court of appeals of the state of New York, in an action for false imprisonment, brought against a judge of the circuit court of the United States, in which the defendant demurred to the plaintiff's complaint. The facts, as set forth in the complaint, or otherwise conceded, were briefly these. The plaintiff was tried before the defendant, as judge of the court, upon an indictment for stealing certain mail bags, the property of the United States, and the jury found that he was guilty, and that the value of the mail bags was less than \$25. By the act of congress, applicable to the case, if the value of the mail bags was found to be less than \$25, the punishment for the offence was a fine of \$200, *or* imprisonment for one year; but the defendant sentenced the plaintiff to pay a fine of \$200, *and* to be imprisoned for one year. The plaintiff paid the fine, during the same term of the court; and after he had been imprisoned five days, a writ of habeas corpus was granted, returnable before the same court; and, at the same term thereof, and upon the return of the habeas corpus, the defendant vacated the sentence already pronounced, passed judgment anew upon the plaintiff, and resented him to be imprisoned for one year; under which sentence he was accordingly imprisoned: and the action was founded upon that imprisonment. Proceedings, to which the defendant was not a party, were taken, to procure a review of the second sentence, by the United States supreme court; and that court

¹ *Bradley v Fisher*, 13 Wall. (U. S.) 335.

adjudged, that the sentence was without authority, and discharged the plaintiff. The court of appeals held, that the action could not be maintained. Folger, J., delivered an elaborate opinion, examining the principal cases on the question, whether an action would lie for a judicial act, in excess of jurisdiction. He said that the question was: "Did the defendant impose the second sentence as a judge; or, although he was at that moment of right upon the bench, and authorized and empowered to exercise the functions of a judge, was the act of resentencing the plaintiff so entirely without jurisdiction, or so beyond and in excess of the jurisdiction, which he then had as a judge, that it was an arbitrary and unlawful act of a private person?" He said that it is plain, that the fact, that a man is rightfully sitting in the seat of justice, does not protect him in an act against one, of whose person he has no jurisdiction, or with respect to a subject matter, of which he has no jurisdiction; but, in this case, the defendant had jurisdiction of both: of the plaintiff's person, because the plaintiff was before him on the return to a writ of habeas corpus, and under the first sentence, which was valid, until it was annulled; and of the subject matter, because, during the same term of the court, the defendant might vacate or modify the sentence, as law and justice would require. That the error was, not in "the subject matter—the general matter then before the court;" but in "the particular matter," or question whether a new sentence could be imposed; that with respect to the latter, the court had the power to adjudicate, and its erroneous adjudication was a judicial error, to be corrected upon review, not a personal wrong to be answered for in a civil action. That the case was not one where the court never had jurisdiction, but that "the last act was in excess of its jurisdiction." "And though, where courts of special and limited jurisdiction

exceed their powers, the whole proceeding is *coram non judice* and void, and all concerned are liable; this has never been carried so far as to justify an action against a judge of a superior court, or one of general jurisdiction, for an act done by him in a judicial capacity." That, although the United States circuit court is not a court of general jurisdiction, it is not an inferior, but a superior court. So that, in conclusion, "the case turns upon a question, more easily stated than it is determined: was the act of the defendant done as a judge? Our best reflection upon it, aided by the reasonings and conclusions of many more cases than we have cited, has brought us to the conclusion, that, as he had jurisdiction of the person and of the subject matter, and as his act was not without the inception of jurisdiction, but was one no more than in excess of or beyond jurisdiction, the act was judicial." ¹

§ 720. **Application, to judges of inferior courts and quasi judicial officers, of rule requiring jurisdiction; no presumptions of jurisdiction.**—There seems to be no solid foundation, for any distinction in this respect, between judges of superior courts, and judges of inferior courts, or *quasi* judicial officers, whose powers are limited to the particular cases specified in the statute, except that the presumption is always in favor of the jurisdiction of the former, whereas the facts, necessary to give jurisdiction to the latter, must be shown, whenever their decisions come in question.² But although, "where

¹ Lange v Benedict, 73 N. Y. 12, aff'g 8 Hun (N. Y.) 362.

See *Ex parte Lange*, 18 Wall. (U. S.) 163, for the ruling of the U. S. supreme court, as to the invalidity of the second sentence; and Lange v Benedict, 99 U. S. 68, dismissing a writ of error from the judgment of the court of appeals in 73 N. Y. 12, on

the ground that no federal question was involved.

² Bloom v Burdick, 1 Hill (N. Y.) 130.
See also, Doswell v Impey, 1 Barn. & Cr. 163;
Levy v Shurman, 6 Ark. 182;
Tucker v Harris, 13 Ga. 1;
Kenney v Greer, 13 Ill. 432;
Case v Woolley, 6 Dana (Ky.) 17;

a statute prescribes that some fact must exist, before jurisdiction can attach in any court, such fact must exist before there can be jurisdiction, and the court cannot acquire jurisdiction by erroneously deciding that the fact exists, and that it has jurisdiction;" yet, "where general jurisdiction is given to a court over any subject, and that jurisdiction depends, in the particular case, upon facts which must be brought before the court for its determination upon evidence; and where it is required to act upon such evidence; its decision upon the question of its jurisdiction is conclusive until reversed, revoked, or vacated, so far as to protect its officers, and all other innocent persons who act on the faith of it." ¹

§ 721. **The same subject.**—The correct rule, therefore, seems to be, that a judge of an inferior court, or an officer exercising *quasi* judicial powers, is not liable for want of jurisdiction, if there is any proof before him of the existence of the facts, upon which his jurisdiction depends, although in truth such facts do not exist.² The cases, however, are not entirely in harmony on this subject. In South Carolina, it was held, that a judge of an inferior court, having jurisdiction of the subject matter, but failing to acquire jurisdiction of the person, by reason of defective service of process, is not liable, in the absence

Revill v Pettit, 3 Met. (Ky.) 314;
 Rossiter v Peck, 3 Gray (Mass.) 538;
 Palmer v Oakley, 2 Dougl. (Mich.) 433;
 Foot v Stevens, 17 Wend. (N. Y.) 483;
 Hart v Seixas, 21 Wend. (N. Y.) 40;
 Pratt v Hill, 16 Barb. (N. Y.) 303;
 Messinger v Kintner, 4 Binn. (Pa.) 97.

¹ Roderigas v East R. Sav. Inst'n., 63 N. Y. 460, per Earl, J., p. 464.

Approved, with respect to this question, and applied to a legal conclusion from a conceded state of facts, Lange v Benedict, 73 N. Y. 12, per Folger, J., pp. 30, 31.

Accord, Brittain v Kinnaird, 1 Brod.

& Bing. 432;

Staples v Fairchild, 3 N. Y. 41;

Porter v Purdy, 29 N. Y. 106.

² Houlden v Smith, 14 Q. B. (Ad. & El.) 841; 19 L. J., Q. B. 170; 14 Jur. 598, citing and commenting upon Calder v Halket, 3 Moore P. C. 28;

Watson v Bodell, 14 M. & W. 57;

Beaurain v Scott, 3 Campb. 388;

Smith v Bouchier, 2 Stra. 993;

Pike v Carter, 3 Bing. 78.

See also, Lowther v Radnor, 8 East 113;

Kemp v Neville. 10 C. B., N. S. 523;

Grove v Van Duyn, 44 N. J. L. 654;

Bradley v Fisher, 13 Wall. (U. S.) 335.

of proof of malice or corruption.¹ And a similar rule appears to have been established in Tennessee, with respect to the exercise of a *quasi* judicial power.² In Louisiana, it has been held, that the president of the board of health of a city, acting under a general order of the board, authorizing him to act in case of an emergency, is liable for unnecessarily fumigating a vessel loaded with fruit, whereby the cargo was damaged.³

§ 722. **Rulings as to motive or corrupt intent.**—The cases, most difficult to reconcile with the general rule, respecting immunity from personal liability for judicial or *quasi* judicial acts, are those where the liability is made to depend, partly or wholly, upon the existence of a malicious or corrupt motive. Some cases, where the absence of such a motive was stated as one of the reasons for such immunity, have already been cited.⁴ In Minnesota, it has been held, that the judge of a municipal court was liable upon allegations, that he and the other defendants, maliciously and without probable cause, entered into a conspiracy to prosecute the plaintiff for perjury; although the judge's active part in the conspiracy consisted entirely of judicial action, founded upon regular proceedings in his court; the decision having been placed on the ground, that the conspiracy was not a part of any judicial proceeding, or in discharge of any judicial function.⁵ And it also has been held, that the members of a court martial are liable to a person, whom they have maliciously convicted of military delinquency.⁶ In Georgia, it has been said, that the mayor and members of

¹ *McCall v Cohen*, 16 S. C. 445.

² *State v Thomas*, 88 Tenn. 491.

³ *Beers v Board of Health*, 35 La. Ann. 1,132.

⁴ *Ante*, §§ 715, 721.

⁵ *Stewart v Cooley*, 23 Minn. 347.

Judge Cooley condemns this ruling as irreconcilable with *Bradley v Fisher*, 13 Wall. (U. S.) 335. Cooley on Torts, 482, note 2 (*412).

⁶ *Shoemaker v Nesbit*, 2 Rawle (Pa.) 201; *Macon v Cook*, 2 Nott. & McC. (S. C.) 379. See Cooley on Torts, *ubi supra*.

the council of a city, who directed the pulling down of a house as a nuisance, were not liable, unless they acted maliciously, illegally, or corruptly.¹ And in Pennsylvania, it has been held, that the members of a school board were liable, for the malicious removal of a teacher.² So in Connecticut, it has been said that a wharfmaster was liable, for ordering the removal of the plaintiff's ship from a certain dock, if the act was malicious, and intended to cause him injury; but the case turned upon the point, that the evidence was insufficient to establish the malice.³ Many other cases may be found in the reports, in each of which the court, either expressly or by implication, has made the immunity from a private action of an officer exercising judicial or *quasi* judicial powers, where he had jurisdiction, depend upon his good faith, or the absence of malice or corruption.⁴

¹ *Pruden v Love*, 67 Ga. 190.

² *Burton v Fulton*, 49 Pa. St. 151.

See also, *Hoggatt v Bigley*, 6 Humph. (Tenn.) 236;

Walker v Hallock, 32 Ind. 239;

Lillenthal v Campbell, 22 La. Ann. 600;

In *Elmore v Overton*, 104 Ind. 548, an action for maliciously refusing a teacher's license, to one lawfully entitled thereto, was sustained, on the ground that the power was administrative, and not judicial or *quasi* judicial.

³ *Gregory v Brooks*, 37 Conn. 365.

⁴ *Ashby v White*, 2 Ld. Raym. 938; 6 Mod. 45; 1 Salk. 19;

Burley v Bethune, 1 Marsh. 220;

Garnett v Ferrand, 6 Barn. & Cr. 611, at p. 626;

Davis v Capper, 10 Barn. & Cr. 28;

Kemp v Neville, 10 C. B., N. S. 523; 31 L. J., C. P., 158; 7 Jur., N. S., 913; 4 L. T. 640; 10 W. R. 6.

Linford v Fitzroy, 13 Q. B. 240; 3 New Sess. Cas. 432; 13 L. J., M. C. 108; 13 Jur. 303;

Hitch v Lambright, 66 Ga. 228;

Garfield v Douglass, 22 Ill. 100;

Billings v Lafferty, 31 Ill. 318;

McCormick v Burt, 95 Ill. 263;

Carter v Harrison, 5 Blackf. (Ind.) 138;

State v Robb, 17 Ind. 536;

Morrison v McFarland, 51 Ind. 206;

McOsker v Burrell, 55 Ind. 425;

Spitznogle v Ward, 64 Ind. 30;

Hetfield v Towsley, 3 Greene (Iowa) 504;

Howe v Mason, 14 Iowa 510;

Macklot v Davenport, 17 Iowa 379;

McCord v High, 24 Iowa 336;

Muscatine, etc., R. R. Comp'y v Horton, 38 Iowa 33;

Chrisman v Bruce, 1 Duv. (Ky.) 63;

Miller v Rucker, 1 Bush (Ky.) 135;

Gregory v Brown, 4 Bibb (Ky.) 28;

Bullitt v Clement, 16 B. Mon. (Ky.) 193;

Morgan v Dudley, 18 B. Mon. (Ky.) 603;

Donahoe v Richards, 38 Me. 379;

Downing v Herrick, 47 Me. 462;

Bevard v Hoffman, 18 Md. 479.

Elbin v Wilson, 33 Md. 135;

Friend v Hamill, 34 Md. 298;

Raynsford v Phelps, 43 Mich. 342;

In the face of such an array of authorities, it must be admitted, that there is some exception to the rule, that the motives of an officer cannot be made the subject of inquiry, for the purpose of subjecting him to a personal liability, for a judicial or *quasi* judicial act, which he had jurisdiction to perform. But it is impossible to define the limits of the exception, or the particular circumstances upon which it depends, so as harmonize all the cases upon that subject. The nearest approach to a general rule, that the author has been able to find, is that the immunity from a private action, founded upon an allegation of malice, although "applicable to judges of courts of record, does not extend to all judicial officers. In the case of inferior magistrates, the act complained of, although judicial and within their jurisdiction, must, in order to shield them from responsibility, have been done honestly and in good faith. Accordingly, if malice is shown, they will be liable to an action." ¹ But the exception is an anomaly, and its existence, in any form, appears

Reed v Conway, 20 Mo. 22;
 Pike v Megoun, 44 Mo. 491;
 Dritt v Snodgrass, 66 Mo. 236;
 Edwards v Ferguson, 73 Mo. 686;
 Wheeler v Patterson, 1 N. H. 88;
 Third Turnpike Comp'y v Champney,
 2 N. H. 199;
 Rowe v Addison, 34 N. H. 306;
 Adams v Richardson, 43 N. H. 212;
 Neighbour v Trimmer, 16 N. J. L. 58;
 Jenkins v Waldron, 11 Johns. (N. Y.)
 114;
 Tompkins v Sands, 8 Wend. (N. Y.)
 462;
 Millard v Jenkins, 9 Wend. (N. Y.) 298;
 Wickware v Bryan, 11 Wend. (N. Y.)
 545;
 Goetcheus v Matthewson, 61 N. Y. 420,
 rev'g 5 Lans. (N. Y.) 214, and 58 Barb.
 (N. Y.) 152;

Peavey v Robbins, 3 Jones L. (N. C.)
 339;
 Hannon v Grizzard, 96 N. C. 293;
 Ramsey v Riley, 13 Ohio 157;
 Stewart v Southard, 17 Ohio 402;
 Gregory v Small, 39 Ohio St. 346;
 Moran v Rennard, 3 Brewst. (Pa.) 601;
 Weckerly v Geyer, 11 S. & R. (Pa.) 35;
 Keenan v Cook, 12 R. I. 52;
 Rail v Potts, 8 Humph. (Tenn.) 225;
 McTeer v Lebow, 85 Tenn. 121;
 Wilkes v Dinsman, 7 How. (U. S.) 69;
 Wilson v Marsh, 34 Vt. 352;
 Henderson v Smith, 26 W. Va. 829.
 See also, *post*, §§ 733-741; 746-750.

¹ Goetcheus v Matthewson, 61 N. Y. 420,
 per Dwight, Com'r, p. 436, citing
 Shearman & Red. on Negligence,
 § 160.

to be irreconcilable with the rules and principles established by numerous adjudications.¹

§ 723. **Justice of the peace, acting under unconstitutional statute.**—It has been held that a justice of the peace is liable in a private action, where he has acted under a statute, which has afterwards been adjudged to be unconstitutional.² But this doctrine was denied in another case, where the question was, whether a justice of the peace was liable, who had proceeded under a municipal ordinance, which the court declared to be void; and it was there held, that the presentation of an information gave him jurisdiction to decide, whether he was authorized to issue a warrant, and therefore to pass judicially upon the validity of the ordinance, and for an

¹ An honest error as to his jurisdiction, made by an inferior officer, is not a defence to an action against him, but goes to the damages.

McClure v Hill, 36 Ark. 268, at p. 626;
Long v Long, 57 Iowa 497.

Many of the cases cited p. 685, note ⁴, were actions against election officers for refusing votes, which is held, in many cases, to be a ministerial act. *Ante*, § 453. Others were actions against assessors or other taxing officers. The entire doctrine is vigorously repudiated in *Weaver v Devendorf*, 3 Denio (N. Y.) 117, per Beardsley, J., p. 120, citing many cases; and in many of the other cases cited in § 713, *ante*. In *Irion v Lewis*, 56 Ala. 190; *Kress v State*, 65 Ind. 106; *Stone v Graves*, 8 Mo. 148; *Mangold v Thorpe*, 33 N. J. L. 134; it was distinctly held, that an action would not lie against a justice of the peace, for a judicial act, upon an allegation of malice, corruption, or the like; and in *Johnston v Moorman*, 80 Va. 131, the same ruling was made, respecting an action against the mayor of a city, as a judge of the

hustings court.

See also, *Taylor v Doremus*, 16 N. J. L. 473.

Judge Cooley says of this class of cases: "In respect to these last cases, though they may seem out of harmony with the general rule above laid down, and the reasons on which it rests, yet we may perhaps safely concede, that there are various duties, lying along the borders between those of a ministerial and those of a judicial nature, which are usually intrusted to inferior officers, and in the performance of which it is highly important, that they be kept as closely as possible within strict rules. If courts lean against recognizing in them full discretionary powers, and hold them strictly within the limits of good faith, it is probably a leaning that, in most cases, will be found to harmonize with public policy." Cooley on Torts, 2d ed. 482 (*413.)

² *Kelly v Bemis*, 4 Gray (Mass.) 83;
Barker v Stetson, 7 Gray (Mass.) 53.
See also, *Ely v Thompson*, 3 A. K. Marsh (Ky.) 70.

error of judgment in that respect he could not be made liable.¹ Where commissioners for bonding a town, in aid of a railroad, issued bonds in excess of the amount authorized by law; it was held, that they were liable to the purchaser upon an implied warranty, as well as their express warranty that their action was lawful; and that they could not defeat the action, by proof that they acted in good faith, and without negligence, or on the ground that the bonds were issued in violation of a provision of the constitution.²

§ 724. **Rule as to officer exercising ministerial powers.**—With respect to officers exercising ministerial powers, the rule of law is well settled, that where an individual sustains an injury by the malfeasance, misfeasance, or nonfeasance of such an officer, acting or omitting to act contrary to his duty, the law gives redress to the injured person by an action for damages.³ The officer is liable

¹ *Henke v McCord*, 55 Iowa 378.

² *Robinson v Bishop*, 39 Hun (N. Y.) 370.

³ *Lane v Cotton*, 1 Salk. 17;

Henly v Mayor, etc., 5 Bing. 91;

Rowning v Goodchild, 2 W. Blackst. 906;

Ashby v White, 2 Ld. Ray. 938; 6 Mod. 45; 1 Salk. 19;

Ferguson v Kinnoull, 9 Cl. & F. 251;

Lyon v Goree, 15 Ala. 360;

Briggs v Coleman, 51 Ala. 561;

Grider v Tally, 77 Ala. 422;

Eslava v Jones, 83 Ala. 189;

McClure v Hill, 36 Ark. 268;

Collins v McDaniel, 66 Ga. 203;

Dilcher v Raap, 73 Ill. 266;

Governor v Dodd, 81 Ill. 162;

Kolb v O'Brien, 86 Ill. 210;

McCord v High, 24 Iowa 336;

Long v Long, 57 Iowa 497;

Hayes v Porter, 22 Me. 371;

County Com'rs v Duckett, 20 Md. 463;

County Com'rs v Baker, 44 Md. 1;

Keith v Howard, 24 Pick. (Mass.) 292;

Nowell v Wright, 3 Allen (Mass.) 166;

Williams v Powell, 101 Mass. 467;

Conway v Russell, 151 Mass. 581;

Russell v Phelps, 42 Mich. 377;

McGuire v Galligan, 57 Mich. 38;

Chouteau v Rowse, 56 Mo. 65;

St. Joseph F. & M. Ins. Comp'y v Le-land, 90 Mo. 177;

Brock v Hopkins, 5 Nebr. 231;

Harrington v Wadsworth, 63 N. H. 400;

Bonnel v Dunn, 28 N. J. L. 153;

Bartlett v Crozier, 15 Johns. (N. Y.) 250;

Shepherd v Lincoln, 17 Wend. (N. Y.) 250;

Bailey v Mayor, etc., 3 Hill (N. Y.) 531;

Adsit v Brady, 4 Hill (N. Y.) 630;

Hickok v Plattsburgh, 15 Barb. (N. Y.) 427;

Smith v Wright, 24 Barb. (N. Y.) 170;

Fish v Dodge, 38 Barb. (N. Y.) 163;

Paulding v Cooper, 10 Hun (N. Y.) 20;

Bassett v Fish, 12 Hun (N. Y.) 209;

Piercy v Averill, 37 Hun (N. Y.) 360;

for nonfeasance, that is, for an omission to do his duty, only to the person who has a special interest in the performance of that duty; as where a sheriff, or other officer having corresponding functions, fails to fulfil the directions of the process delivered to him; in which case he is liable only to the party interested in the execution of the process. But for misfeasance, or negligence in the performance of his duty, and also for malfeasance, or excess or abuse of his power, he is liable to any person who sustains injury thereby.

§ 725. **The same subject.**—Thus an officer, charged by statute with an absolute and certain duty, in the performance of which an individual has a special interest, is liable to the latter for a refusal to perform it, and is not relieved from such liability, because his disobedience was prompted by an honest belief that the statute was unconstitutional.¹ So an officer, refusing to obey the mandate of a court to levy a tax, in order to pay a judgment against a county, is liable to the judgment creditor, although the court, by proceedings for contempt, might compel him to levy the tax.* On the other hand, where the duty was owing to the public only, the officer is not liable to an individual, who may have been incidentally injured by his failure to perform it.³

Hutson v Mayor, etc., 9 N. Y. 163;
Robinson v Chamberlain, 34 N. Y. 389;
Fulton F. Ins. Comp'y v Baldwin, 37
 N. Y. 648;

Hicks v Dorn, 42 N. Y. 47;
Hover v Barkhoof, 44 N. Y. 113;
McCarthy v Syracuse, 46 N. Y. 194;
Clark v Miller, 54 N. Y. 528;
Olmsted v Dennis, 77 N. Y. 378;
Bennett v Whitney, 94 N. Y. 302;
Woolley v Baldwin, 101 N. Y. 688;
Kendall v Stokes, 3 How. (U. S.) 87;
Amy v Supervisors, 11 Wall. (U. S.) 136;
Stevens v Dudley, 56 Vt. 158.

See also, *Hover v Barkhoof*, 44 N. Y.
 113, and cases cited;
Amy v Sup'rs, 11 Wall. (U. S.) 136.

² *St. Joseph Fire & M. Ins. Comp'y v*
Leland, 90 Mo. 177.
Dow v Humbert, 91 U. S. 294.
 The rule is the same where the omis-
 sion is made a penal offence.
Hayes v Porter, 22 Me. 371;
Raynsford v Phelps, 43 Mich. 342, per
Cooley, J., p. 345;
Bennett v Whitney, 94 N. Y. 302.
 See also, *Farmers' T. Comp'y v Cov-*
entry, 10 Johns. (N. Y.) 389.

¹ *Clark v Miller*, 54 N. Y. 528.

³ See *ante*, §§ 707, 708.

§ 726. **Liability for negligence.**—But an officer owes to every individual, the duty of performing his official acts with due care; and he is consequently liable to any individual, who is injured in person or in property, by reason of his negligence in performing a ministerial act. Many instances, where actions for such negligence have been sustained, against not only the officer himself, but against the sureties in his official bond, have been given in former chapters of this work.¹ But a full consideration of the rules and principles, which govern such actions, and the application thereof to particular cases, cannot be attempted in a work of this character. The subject of negligence is a distinct and well explored branch of the law, and those questions are fully considered in the works specially devoted to that subject. A few cases only, possessing peculiar features, and indicating in outline the principles, applicable to the liability of a public officer to a private individual, for an injury to the latter, caused by the former's negligence in the performance of his official duty, will be given here, and in subsequent portions of this chapter. The distinction, between judicial and ministerial functions, was considered at length in a former chapter;² and it was there stated, and the doctrine illustrated by several adjudications, that where an officer, whose general functions are judicial, as for instance, the judge of a court, is vested by law with any ministerial functions, his duty, with respect to the performance thereof, and the liability incurred by him in the course of such performance, are not affected by his judicial character, but are precisely the same as those of any purely ministerial officer, charged with the same functions.³ And it was also shown, that the ministerial character of a particular function, is not affected by the

¹ *Ante*, ch. 12.

³ *Ante*, §§ 534, 539.

² *Ante*, ch. 23.

fact, that in order to perform the same, it is necessary for the officer to decide upon questions of fact, relating to the contingency upon which he is empowered to act, or the best mode of acting, or the like.¹ These principles are also stated and illustrated in many of the cases herein-after cited.

§ 727. **The same subject.**—Several of the principles, applicable to this class of cases, are ably stated and illustrated in a decision of the supreme court of the state of New York. In the case referred to, an action was brought against the persons holding the offices of mayor and aldermen of a city, to recover damages for negligently and carelessly suffering a certain sidewalk to become out of repair, and large quantities of snow and ice to accumulate thereupon, to the knowledge of the defendants, whereby the plaintiff, without her fault, slipped upon the sidewalk, and was injured. Upon a demurrer to the complaint, the court held, that the plaintiff was entitled to recover. Learned, P. J., delivering the opinion of the majority of the court, after stating the general rule of liability by reason of ministerial acts, added: “Of course, this rule does not apply to an action, which is, in any sense, judicial. Now it is undoubtedly true, that the deciding whether or not a sidewalk shall be made, and of what materials and of what grade it shall be made, is a *quasi* judicial act. But, on the other hand, the keeping of a sidewalk or a street in repair has often been held to be a ministerial act. . . . If the duty is imposed on a public officer, of keeping a sidewalk or a street in repair, he cannot excuse himself, on the ground that, in his judgment, it was best not to repair it. He may excuse himself, of course, by showing that he did the best that he could.” The opinion then considered the defendants’ argument, that they are not charged with the duty of

¹ *Ante*, §§ 537, 538, 607.

doing the manual work of repairing, and keeping snow off the sidewalks, and that they are not responsible for the negligence, etc., of their employees; which is answered by referring to the fact, that the question arises upon a demurrer to the complaint, which alleges that they were negligent, etc. It then took up the objection, that the defendants cannot be made liable, because the charter of the city declares, that the city shall not be liable for any injury, caused by a sidewalk being out of repair, or by stepping upon snow or ice thereon. The learned presiding justice said, that this position is untenable, since it has been holden, that a canal contractor is liable for neglect, although the state is not liable; and that a street commissioner is liable for negligence, where the city charter expressly exempts the city from such liability; and that public officers are not relieved from liability, because the public body, which they represent, is not liable; and he concluded by holding, that the defendants, since they have by the city charter the powers, are under the duty to exercise the powers, of commissioners of highways, upon whom the statute casts the duty of keeping the highways in repair.¹ Where an action was brought against a justice of the peace, for not entering a judgment within four days, after a cause pending before him was tried, and finally submitted to him, whereby he lost jurisdiction; the court said, that his duty under the statute was twofold, one to render judgment, being judicial, and the other to enter it, being ministerial; that the plaintiff alleged a default in regard to the latter only, but that the record showed that neither act was performed; and inasmuch as no judgment or decision was

¹ *Piercy v Averill*, 37 Hun (N. Y.) 380, citing, upon the point that the defendants liability is not affected by exemption of the city from liability, *Robinson v Chamberlain*, 34 N. Y. 389;

Bennett v Whitney, 94 N. Y. 302.

It is not a defence, to an action against a city, by an officer unlawfully removed, that in removing him the city acted judicially. *Dillon Mun. Corp.*, § 235 (*174).

made, there was none to enter, and the ministerial duty never attached; and so the action could not be maintained.¹

§ 728. **The same subject.**—So, the supreme judicial court of Massachusetts held, that the tender of a draw-bridge, appointed by the governor and receiving a salary, who has full control of the passing of all vessels through the draw, and is required to give bond for the faithful performance of his duty, is liable in damages to a person injured, in consequence of his negligence in not shutting the gates, and hanging out lanterns while opening the draw.²

§ 729. **Rule where judicial or quasi judicial officer performs ministerial duty.**—So a judge, or other strictly judicial officer, is liable to an action, for his omission or neglect of a duty imposed upon him, which is purely ministerial, no discretion, with respect to his acting or refusing to act, being conferred upon him by the statute imposing it; and the same rule applies to an officer exercising *quasi* judicial functions.³

¹ *Evarts v Kiehl*, 102 N. Y. 296.

² *Nowell v Wright*, 3 Allen (Mass.) 166, citing *Jones v Bird*, 5 B. & Ald. 837; *Hall v Smith*, 2 Bing. 156; *Schinotti v Bumsted*, 6 T. R. (D. & E.) 646; *White v Phillipston*, 10 Met. (Mass.) 108; *Bartlett v Crozier*, 15 Johns. (N. Y.) 250; reversed, on another point, 17 Johns. (N. Y.) 439.

³ *Ferguson v Kinnoull* (Earl of), 9 Cl. & Fin. 251, where the rule is fully discussed, and the English cases cited; *Thompson v Holt*, 52 Ala. 491; *Grider v Tally*, 77 Ala. 422; *People v Bush*, 40 Cal. 344; *Smith v Trawl*, 1 Root (Conn.) 165; *Peters v Land*, 5 Blackf. (Ind.) 12; *Howe v Mason*, 14 Iowa 510;

McCord v High, 24 Iowa 336; *State v Carrick*, 70 Md. 586; *Briggs v Wardwell*, 10 Mass. 356; *Noxon v Hill*, 2 Allen (Mass.) 215; *Pike v Megoun*, 44 Mo. 491; *Rowe v Addison*, 34 N. H. 306; *Taylor v Doremus*, 16 N. J. L. 473; *Houghton v Swarthout*, 1 Denio (N. Y.) 589; *Christopher v Van Liew*, 57 Barb. (N. Y.) 17; *Place v Taylor*, 22 Ohio St. 317; *Gaylor v Hunt*, 23 Ohio St. 255; *Fairchild v Keith*, 29 Ohio St. 156; *Spears v Smith*, 9 Lea (Tenn.) 483; *McTeer v Lebow*, 85 Tenn. 121; *Wilson v Marsh*, 34 Vt. 352, and other cases cited *ante*, ch. 23, and *post*, §§ 733-735.

§ 730. **Ministerial officer cannot justify under unconstitutional statute.**—An officer, exercising a ministerial power, cannot justify under an unconstitutional statute, although he acted in good faith, and before the statute had been declared to be unconstitutional.¹

§ 731. **Officer's liability to private action not affected by his giving official bond.**—The liability of an officer to a private action is not affected by the fact, that he has given an official bond. The effect of such a bond is merely to render the sureties therein liable for his official acts or omissions; whereas the action by an individual is founded upon a personal wrong committed by him.² So that the fact, that the bond does not cover the particular act or omission, upon which the action is founded, does not tend to show that the officer is not liable therefor, civilly or criminally.³ The bond of a justice of the peace does not include his judicial acts, but it applies only to his ministerial acts;⁴ it does not alter his liability for either, but merely renders his sureties liable for acts for which he is liable.⁵

¹ Sumner v Beeler, 50 Ind. 341;
Fisher v McGirr, 1 Gray (Mass.) 1;
Lynn v Polk, 8 Lea (Tenn.) 121;
Astrom v Hammond, 3 McLean (U. S.)
107;

Woolsey v Dodge, 6 McLean (U. S.)
142.

See also, Board of Liquidation v
McComb, 92 U. S. 531;

Cunningham v Macon & B. R. R.
Comp'y, 109 U. S. 446;

Poindexter v Greenhow, 114 U. S. 270;
Norton v Shelby Co., 118 U. S. 425.

Contra, Sessums v Botts, 34 Tex. 335,
holding that a ministerial officer is

protected in obeying a statute, until
it is judicially declared to be uncon-
stitutional. As to acts of a judicial
officer, see *ante*, § 723, and of an offi-
cer *de facto*, see *ante*, ch. 27.

Generally, see also, Campbell v Sher-
man, 35 Wis. 103.

² State v Conover, 28 N. J. L. 224, per
Haines, J., pp. 229, 230.

See also, Comm. v Cole, 7 B. Mon. (Ky.)
250.

³ Holt v McLean, 75 N. C. 347.

⁴ *Ante*, § 237.

⁵ Irion v Lewis, 56 Ala. 190.

II. *Special rulings, relating to the liabilities of particular officers to private actions.*

§ 732. **References to rulings cited elsewhere.**—Many rulings of this character were given in the chapter relating to the liabilities of the sureties in official bonds;¹ others will be found in the foregoing sections of this chapter.

(1.) JUSTICE OF THE PEACE.

§ 733. **Variety of his functions, and extent of the doctrine.**—The variety of the functions, discharged by a justice of the peace, which are often political or administrative, and, even in the course of legal proceedings before him, are partly judicial and partly ministerial, has given rise to numerous questions, some of which are very perplexing. Some citations of cases, in which such questions arose, will be found in foregoing pages of this work.² It has been also held, that where a justice of the peace has jurisdiction of the cause of action, an error, in directing an order of arrest to the sheriff, or any constable, where the statute requires it to be directed to the sheriff, does not render him personally liable;³ nor is he personally liable for giving judgment for costs, where he had no authority so to do;⁴ or for making a writ issued by him, returnable before himself, instead of before the district court;⁵ or for entering judgment and issuing execution, before the time allowed by law,⁶ or for refusing to render judgment for the plaintiff, and adjourning the cause against the plaintiff's objection, where the defendant did not appear, although the statute required him so to render judgment, and meanwhile other creditors secured liens;⁷ or for issuing an

¹ *Ante*, ch. 12, *passim*.

² See *ante*, §§ 235, 237, 539, 727.

³ *Allec v Reece*, 39 Fed. Rep. (U. S.) 341;

⁴ *White v Morse*, 139 Mass. 162.

⁵ *Reid v Hood*, 2 Nott & McC. (S. C.) 168.

⁶ *Abrams v Carlisle*, 18 S. C. 242;
Keeler v Woodard, 4 Chand. (Wis.) 34.

⁷ *Merwin v Rogers*, 24 N. Y. St. Rep'r.
496; 6 N. Y. Supp. 882.

attachment on a note, before it was payable, where the affidavit stated that it was payable;¹ or for entering judgment for less than the sum proved to be due, although the plaintiff alleged that this was done fraudulently;² or for corrupt official conduct on the trial of a cause;³ or for erroneously dismissing a cause, for the failure of the plaintiff to appear;⁴ or for taking a recognizance on appeal which is insufficient in form;⁵ or for erroneously refusing to grant an appeal;⁶ or for erroneously determining the sufficiency of bail;⁷ or for erroneously granting a rehearing, and altering his former judgment;⁸ or for failing to render and enter a judgment, within four days after a cause has been finally submitted to him, as the statute requires him to do.⁹ In these, and many other instances to be found in the reports, although there is often considerable conflict as to the character of particular acts, it was held, that the justice acted judicially, and he was therefore protected within the rule, that a private action will not lie against an officer for a judicial act, which he had jurisdiction to perform, however erroneous it might have been, and whatever might have been his motives in the performance thereof.¹⁰

¹ *Connelly v Woods*, 31 Kan. 359.

See also, *Grove v Van Duyn*, 44 N. J. L. 654.

² *Kress v State*, 65 Ind. 106.

³ *Irion v Lewis*, 56 Ala. 190.

⁴ *Hitch v Lambright*, 66 Ga. 228.

⁵ *Chickering v Robinson*, 3 Cush. (Mass.) 543.

⁶ *Jordan v Hanson*, 49 N. H. 199.

See also, *Tyler v Alford*, 38 Me. 530;
Tompkins v Sands, 8 Wend. (N. Y.) 462.

⁷ *Lining v Bentham*, 2 Bay (S. C.) 1;

See also, *State v Johnson*, 2 Bay (S. C.) 385.

⁸ *Gregory v Brown*, 4 Bibb (Ky.) 28.

⁹ *Evarts v Kiehl*, 102 N. Y. 296.

Semble, however, that he would have

been liable, if he had rendered the judgment within the four days, and had omitted to enter it in his docket,

¹⁰ *Heard v Harris*, 68 Ala. 43;

Holcomb v Cornish, 8 Conn. 375;

Holtzman v Robinson, 2 MacArthur (D. C.) 520;

Walker v Floyd, 4 Bibb (Ky.) 237;

Bullitt v Clement, 16 B. Mon. (Ky.) 193;

Little v Moore, 4 N. J. L. 74;

Mangold v Thorpe, 33 N. J. L. 134;

Butler v Potter, 17 Johns. (N. Y.) 145.

See also, *Pratt v Gardner*, 2 Cush. (Mass.) 63;

Raymond v Bolles, 11 Cush. (Mass.) 315;

Piper v Pearson, 2 Gray (Mass.) 120;

Way v Townsend, 4 Allen (Mass.) 114;

Fisher v Deans, 107 Mass. 118.

Johnston v Moorman, 80 Va. 131.

§ 734. **Where justice's act was of a ministerial character.**—On the other hand, it has been held, that in issuing an execution upon a judgment recovered before him, a justice of the peace acts ministerially, and not judicially, and therefore an action lies against him, for failing to issue an execution, upon the request of the judgment creditor entitled thereto;¹ or upon a void judgment;² or where the execution is issued against the body, in a case wherein such an execution is not allowed by law;³ and generally, wherever the execution is unwarranted by law.⁴ So, he is liable to the judgment creditor, for issuing an execution void upon its face.⁵ And a justice of the peace is liable for failure to issue a writ *de retorno habendo*, upon the application of a defendant, who has recovered a judgment before him, where the property was taken under a writ of replevin; and his official bond is also liable therefor.⁶ So he is liable, for rendering a judgment exceeding his jurisdiction;⁷ or after the cause has been discontinued by an unauthorized adjournment;⁸ or for issuing an attachment, or a search warrant, or other process, without the preliminary proof which the statute requires;⁹ or for issuing an attachment, in a case where he is not authorized so to do by law;¹⁰ or a warrant of arrest, under the same circumstances, although he acted honestly;¹¹ or for committing a witness for contempt in disobeying a subpoena, where the proceedings to punish him were not begun,

¹ *Fairchild v Keith*, 29 Ohio St. 156.

Contra, that issuing an execution is a judicial act, and that the justice is not liable for issuing it negligently, in such an unlawful form that the creditor lost the debt. *Wertheimer v Howard*, 30 Mo. 420.

² *Inos v Winspear*, 18 Cala. 397.

³ *Briggs v Wardwell*, 10 Mass. 356;
Sullivan v Jones, 2 Gray (Mass.) 570.

⁴ *Fisher v Deans*, 107 Mass. 118.
See also, *Albee v Ward*, 8 Mass. 79.

⁵ *Noxon v Hill*, 2 Allen (Mass.) 215.

⁶ *State v Carrick*, 70 Md. 586.

⁷ *Estopinal v Peyroux*, 37 La. Ann. 477.

⁸ *Spencer v Perry*, 17 Me. 413.

⁹ *Grumon v Raymond*, 1 Conn. 40;
Tracy v Williams, 4 Conn. 107;
Flack v Harrington, 1 Ill. 213;
Adkins v Brewer, 3 Cow. (N. Y.) 203.

¹⁰ *Wright v Rouss*, 18 Nebr. 234.

¹¹ *Truesdell v Combs*, 33 Ohio St. 186.

until after the end of the cause, in which the subpoena was issued;¹ or where, after convicting a person for assault and battery, he allows him to go at large, and then issues a *mittimus*, without a previous *capias* to show cause;² or where he voluntarily or negligently absents himself from the place and at the time specified, after he has been notified of the arrest of a person, under process issued by him.³ So, where a person was arrested on a charge of larceny, and money was taken from him, and delivered to the justice who issued the process, and the money was not identified as that stolen, it was held, that the justice was liable for the money, to the person from whom it was taken.⁴ In these, and numerous other cases to be found in the reports, the justice was holden personally liable to the individual injured, because he acted wrongfully and without authority, either in the exercise of a power committed to him, which was ministerial in its character, or by exceeding his jurisdiction and authority, with respect to a judicial power.⁵

§ 735. **Not liable for incorrect statement of amount of judgment.**—Where a party, against whom a judgment had been rendered by a justice of the peace, applied to

¹ *Clarke v May*, 2 Gray (Mass.) 410.
See also, *Piper v Pearson*, 2 Gray (Mass.) 120.

² *Doggett v Cook*, 11 Cush. (Mass.) 262;
Fisher v Deans, 107 Mass. 118.

³ *Shaw v Reed*, 16 Mass. 450.

⁴ *Welch v Gleason*, 28 S. C. 247.

⁵ *Kelly v Moore*, 51 Ala. 364;
Lanpher v Dewell, 56 Iowa 153;
Revill v Pettit, 3 Met. (Ky.) 314;
Bore v Bush, 6 Mart. N. S. (La.) 1;
Terrail v Tinney, 20 La. Ann. 444;
Tyler v Alford, 38 Me. 530;
Kendall v Powers, 4 Met. (Mass.) 553;
Knowles v Davis, 2 Allen (Mass.) 61;
Guenther v Whiteacre, 24 Mich. 504;

Evertson v Sutton, 5 Wend. (N. Y.) 281;
Tompkins v Sands, 8 Wend. (N. Y.) 462;

Cunningham v Bucklin, 8 Cow. (N. Y.) 178;

Houghton v Swarthout, 1 Denio (N. Y.) 589;

Christopher v Van Liew, 57 Barb. (N. Y.) 17;

Blythe v Tompkins, 2 Abb. Pr. (N. Y.) 468;

Kerns v Schoonmaker, 4 Ohio 331;

Miller v Grice, 2 Rich. L. (S. C.) 27;

Morrill v Thurston, 46 Vt. 732;

Vaughn v Congdon, 56 Vt. 111.

See also, *Morgan v Hughes*, 2 T. R. (D & E.) 225.

him by letter for a statement of the amount of the judgment, in order to prepare a bond for an appeal; and, in answer to the application, the justice gave the amount incorrectly, whereupon the appeal taken by the party was quashed for the variance; it was held, that an action would not lie against the justice, founded upon an allegation of negligence or carelessness, because it was not his official duty to give a certificate for that purpose, and "no fraudulent intent is imputed."¹

(2.) HIGHWAY OFFICER.

§ 736. **What duties are quasi judicial.**—Some of the duties of highway officers are of a *quasi* judicial character, and others are of a ministerial character. To the former class belong all their duties, connected with the opening, discontinuing, closing, and general management of the highways and other roads, including the assessment of damages or of benefits thereupon. These duties involve the exercise of judgment and discretion, and, upon the principles heretofore stated, highway officers are exempt from liability to a private action in the performance thereof, as long as they keep within their statutory jurisdiction; but they are so liable whenever they exceed their jurisdiction.²

§ 737. **What duties are ministerial.**—The duty of keeping the highways, roads, and bridges, under their

¹ Wickware v Bryan, 11 Wend. (N. Y.) 545.

² Elder v Bemis, 2 Met. (Mass.) 599;
Benjamin v Wheeler, 8 Gray (Mass.) 409;
Benjamin v Wheeler, 15 Gray (Mass.) 486;
Morrison v Howe, 120 Mass. 565;
Denniston v Clark, 125 Mass. 216;
Hatch v Hawkes, 126 Mass. 177;
Upham v Marsh, 128 Mass. 546;
Johnson v Dunn, 134 Mass. 522;
Sage v Laurain, 19 Mich. 137;

Highway Com'rs v Ely, 54 Mich. 173;
Larned v Briscoe, 62 Mich. 393;
Clark v Phelps, 4 Cow. (N. Y.) 190;
Van Steenbergh v Bigelow, 2 Wend. (N. Y.) 42;
Miller v Brown, 56 N. Y. 383;
Morse v Williamson, 35 Barb. (N. Y.) 472;
Harrington v Com'rs, etc., 2 McCord (S. C.) 400.
See, however, Adams v Richardson, 43 N. H. 212.

control, in proper repair, is ministerial, and for a failure to perform that duty, they are liable to an action for damages, by any person injured by reason of the insufficiency of any highway, road, or bridge, under their control, provided they have funds at their disposal, sufficient for the purpose of keeping the same in proper repair, but not otherwise;¹ and the town is not liable, in the absence of a statute to that effect, to reimburse the highway officers for a liability so sustained by them, and it cannot be compelled to do so by mandamus or action.² They are liable, even if they have not sufficient funds, where they have authority to procure such funds;³ for it is their duty to make the effort to obtain funds, "to use the power given to them, and apply through the proper channels for the needed funds; failing to do so, they were negligent."⁴ Their duty is not discharged, by waiting to be notified that the highway is out of repair; it involves "the exercise of a reasonable degree of watchfulness."⁵ But they are not liable for a defect, which a careful examination would not reveal.⁶ And the rule, requiring them to have funds, or the means of procuring funds, in order to render them liable, does not apply to "a case of misfeasance, where the officer

¹ *Adsit v Brady*, 4 Hill (N. Y.) 630;
Lament v Haight, 44 How. Pr. (N. Y.) 1;
Warren v Clement, 24 Hun (N. Y.) 472;
Babcock v Gifford, 29 Hun (N. Y.) 186;
Piercy v Averill, 37 Hun (N. Y.) 360;
Hutson v Mayor, etc., 9 N. Y. 163;
Garlinghouse v Jacobs, 29 N. Y. 297;
Robinson v Chamberlain, 34 N. Y. 389;
Hover v Barkhoof, 44 N. Y. 113;
Hines v Lockport, 50 N. Y. 236;
Weed v Ballston Spa, 76 N. Y. 329;
Bennett v Whitney, 94 N. Y. 302;
Pomfrey v Saratoga Spr., 104 N. Y. 450.
 See, however, *Lynn v Adams*, 2 Ind.
 143;
Dunlap v Knapp, 14 Ohio St. 64.
 In New York, many special statutes

have, from time to time, been enacted, imposing upon particular municipalities, the duties and liabilities of highway officers; and by L. 1881, ch. 700, towns were made liable for injuries by defective highways, and were given a remedy over against delinquent commissioners.

² *People v Town Auditors*, 74 N. Y. 310;
People v Town Auditors, 75 N. Y. 316.

³ *Hover v Barkhoof*, 44 N. Y. 113.
 See also, *Olmsted v Dennis*, 77 N. Y. 378.

⁴ *Warren v Clement*, 24 Hun (N. Y.) 472.

⁵ *Bostwick v Barlow*, 14 Hun (N. Y.) 177.

⁶ *Hicks v Chaffee*, 13 Hun (N. Y.) 293.

had acted, but conducted himself negligently, to the special injury of an individual.¹ But where the highway officers have funds, but not sufficient funds, or the means to procure sufficient funds, to make all the repairs which are needed, it becomes a matter of judgment and discretion, to determine the repairs which are most urgently needed, and they are not liable for an error of judgment in making such determination.²

(3.) ASSESSOR OF TAXES.

§ 738. **What acts are quasi judicial ; and what ministerial.**—The duties of tax assessors are also partly *quasi* judicial, and partly ministerial, and the courts, with occasional variations respecting the application thereof, have followed the same rules, with respect to private actions against those officers for erroneous official acts. The cases in New York were fully examined in an opinion, delivered in the court of appeals of that state, in an action by a bank, to recover a tax levied under an assessment upon its capital stock, in violation of a statute forbidding such an assessment, and providing for the taxation of the stockholders. The court held, that the action could be maintained. Church, Ch. J., delivering the opinion, adverted to the defendants' argument that the act was judicial, and said: "Some of the duties of assessors are judicial in their nature, and as to these, when acting within the scope of their authority, they are protected from attack collaterally, to the same extent as other judicial officers; but they are subordinate officers, possessing no authority except such as is conferred upon them by statute; and it is a well settled and salutary rule, that such officers must see that they act within the authority committed to them. When they have no power to act at

¹ *Bennett v Whitney*, 94 N. Y. 302.

See also, *Garlinghouse v Jacobs*, 29 N. Y. 297.

² *Monk v New Utrecht*, 104 N. Y. 552.

all in a given case, either as to person or property, their acts are void. So, when their right to act depends upon the existence of some fact, which they erroneously determine to exist, their acts are void. So, in performing a ministerial duty, their acts are void, if not in accordance with law. But having jurisdiction of the person and subject matter, if they err in the exercise of it, they are protected." He illustrated these principles, by citing the former cases, holding that if assessors erred in determining that a person was a taxable inhabitant of the town, they were liable to an action; that where lands of a non-resident of a town were assessed to a resident as resident lands, the assessment was void; and that the same result followed, where a building exempt as a seminary was assessed. In one case, where an action was brought against assessors by a clergyman, for not allowing him the statutory exemption of \$1,500, it appearing that he had property to a larger amount, it was held, that the assessors were not liable, as they had jurisdiction to act, and in fixing the value of the property they exercised a judicial power; but, in another case, where the clergyman did not possess property to the amount of the exemption, it was held that they were liable, as they had no jurisdiction, "and could not obtain any, by deciding wrongfully that he was not a minister." After citing and explaining other cases, supposed to conflict with these rulings, the learned chief judge concluded: "The distinction is between an erroneous and an illegal assessment. The former is where the officers have power to act; but err in the exercise of the power, the latter where they have no power to act at all, and it does not aid them to decide that they have."¹

¹ Nat. Bk. of Chemung v Elmira, 53 N. Y. 49, reversing 6 Lans. (N. Y.) 116. Opinion by Church, Ch. J., citing and commenting upon Mygatt v Washburn, 15 N. Y. 316;

Whitney v Thomas, 23 N. Y. 281; Chegaray v Jenkins, 5 N. Y. 376; Weaver v Devendorf, 8 Denio (N. Y.) 117; Prosser v Secor, 5 Barb. (N. Y.) 607. And explaining and disapproving

§ 739. **The same subject; illustrations.**—On the other hand, it was held by the court of appeals of the same state, (and the decision was affirmed by the supreme court of the United States,) that tax assessors were not liable, for making an assessment on the par value of the plaintiff's shares of stock in a national bank, where the statute required the assessment to be made upon the market value of the shares; although a similar assessment was made upon the shares of each of the national banks in the city, some of which had a market value twice as large as the plaintiff's shares, the effect of which was, as the court held, to impose upon the plaintiff, a greater burden of taxation, than that which properly belonged to him. It was said by the court, that "in order to establish an individual liability, it must be made to appear against the assessors, not only that the assessment was erroneous, but that such assessors had no jurisdiction whatever in laying the tax. If they had jurisdiction, both of the person taxed, and of the subject matter, then their acts partake of a judicial character; and, however erroneous or unequal the tax may be, do not fix an individual liability upon them, at least when they act in good faith, and without malice."¹ So, the supreme court of the same state held, that an action would not lie against the assessors of a town, for imposing a tax upon the plaintiff for a dog, under a statute rendering the person who "harbors" a dog liable for the tax, although the plaintiff did not in fact harbor the dog; inasmuch as the plaintiff

dicta in *Barhyte v Shepherd*, 35 N. Y. 238;

Swift v Poughkeepsie, 37 N. Y. 511.

Followed, holding assessors liable, where a farm lying partly in each of two adjoining towns, was assessed in the town wherein the owner did not reside, *Dorn v Backer*, 61 N. Y. 261, rev'g 61 Barb. (N. Y.) 597; and

where they assessed a nonresident's land to him personally. *Hilton v Fonda*, 86 N. Y. 339.

See also, *Haley v Whitney*, 53 Hun (N. Y.) 119.

¹ *Williams v Weaver*, 75 N. Y. 30, aff'd 100 U. S. 547.

was a resident of the town, and the dog was, for part of the time, on the plaintiff's land, so that the assessors "had jurisdiction of the subject matter assessed, and of the person of the plaintiff," and "acted within the limits of the jurisdiction conferred upon them, and are not liable for an erroneous determination of that question."¹

§ 740. **Rulings under Massachusetts statute.**—In Massachusetts, it is now expressly provided by statute, that assessors are not liable for the assessment of a tax, where it was assessed pursuant to a lawful vote, etc., "except for the want of integrity and fidelity on their own part."² Before the enactment of that statute, the courts of Massachusetts held, that assessors were liable in such a case.³ And in cases not within the statute, the courts of that state have adopted substantially the same rules, as those which govern in New York.⁴ Where the right to vote is made dependent upon payment of a tax, assessors are not liable for omitting to tax the plaintiff, whereby he lost his vote; unless the plaintiff shows their knowledge of his liability to be taxed, and a wilful omission by them to tax him, for the purpose of depriving him of his vote.⁵

§ 741. **The same subject; miscellaneous rulings.**—It has been held, in Iowa, that a tax payer may maintain an action against an assessor, for an overestimate of his property for the purpose of taxation, if it was thus overestimated maliciously.⁶ And the rule, that they are not liable, where they have jurisdiction of the person and of

¹ *Robinson v Rowland*, 26 Hun (N. Y.) 501.

² Pub. Stat. of Mass., p. 113, § 94.

³ *Gage v Currier*, 4 Pick. (Mass.) 399;
Ingraham v Doggett, 5 Pick. (Mass.) 451;

Little v Merrill, 10 Pick. (Mass.) 543;

Taft v Wood, 14 Pick. (Mass.) 362;

Freeman v Kenney, 15 Pick. (Mass.) 44.

⁴ *Stetson v Kempton*, 13 Mass. 272;

Inglee v Rosworth, 5 Pick. (Mass.) 498;
Dickinson v Billings, 4 Gray (Mass.) 42;

Blankinship v Hadley, 11 Gray (Mass.) 431;

Judd v Thompson, 125 Mass. 553.

⁵ *Griffin v Rising*, 11 Met. (Mass.) 339.

⁶ *Parkinson v Parker*, 48 Iowa 667, at p. 669.

the subject matter, "for errors of judgment, and unintentional mistakes, irregularities, or illegalities in the assessment," has been established and applied in other states.¹ The rule of law, as to the liability of assessors, and other officers having corresponding duties, to a judgment creditor, for failure to levy a tax to pay a judgment recovered against the municipality, was considered in a previous section of this chapter.² Other rulings, relating, directly, or indirectly, to the liability of these officers, have been cited elsewhere.³

(4.) RECORDING OFFICER.

§ 742. **His general duties are ministerial.**—The question, whether a recording officer is liable for an error in a search and certificate of title, made by him, to any one, except the person who employed him, has been already considered.⁴ The general duties of a recording officer are purely ministerial; and he is therefore liable, to the person entitled to his service, for any failure diligently to perform such duties; provided, of course, that his fees are paid or tendered, where he is entitled to them in advance, or that he accepts the employment, without requiring advance payment. Thus, he is liable for an omission to record, seasonably and in its proper order, every instrument delivered to him for that purpose, which may be recorded under the statutory provisions relating thereto; or for recording the same incorrectly; and for such a failure of his duty he is liable, either to the grantor or to the grantee in the instrument, according to the nature of the error, or other circumstances from which the injury arises. But the extent of his liability to either, and his liability, if any, to a subsequent grantee, often pre-

¹ *McDaniel v Tebbetts*, 60 N. H. 497;
Wilson v Marsh, 34 Vt. 352.
 See also, *Dillingham v Snow*, 5 Mass.
 547;

Odiorne v Rand, 59 N. H. 504.

² *Ante*, § 725.

³ *Ante*, § 541.

⁴ *Ante*, § 707.

sent questions of great difficulty, upon which the cases are not harmonious, depending, as those questions do, upon considerations, relating to the person to whom the duty is owing, and the remote or proximate cause of the injury, and upon the different circumstances under which the injury occurred; as to which the rules of law are not distinctly defined, nor are they certain in their application.¹ Most of these questions properly belong to the treatises on the measure of damages.

§ 743. **Liability for imperfect index; the measure of damages.**—The statutes invariably require the recording officer to make, and keep for public reference, an index to the instruments recorded; and he is liable to any person, who is injured by relying upon an index, which is defective.² But here again, a question is presented, respecting the measure of damages; for the courts have held, that a failure to index, or an error in indexing a conveyance, does not affect the grantee's title.³

¹ *Mims v Mims*, 35 Ala. 23;
Chamberlain v Bell, 7 Cal. 292;
Welles v Hutchinson, 2 Root (Conn.) 85;
Shepherd v Burkhalter, 13 Ga. 443;
Merrick v Wallace, 19 Ill. 486;
Kerr v Russell, 69 Ill. 666;
Scoles v Wilsey, 11 Iowa 261;
Miller v Bradford, 12 Iowa 14;
Breed v Conley, 14 Iowa 269;
Brydon v Campbell, 40 Md. 331;
Sinclair v Slawson, 44 Mich. 123;
Parret v Shaubhut, 5 Minn. 323;
Terrell v Andrew Co., 44 Mo. 309;
Bishop v Schneider, 46 Mo. 472;
Garrard v Davis, 53 Mo. 322;
Davis v Thompson, 1 Neva. 17;
Beekman v Frost, 18 Johns. (N. Y.) 544,
 rev'g, s. c., p. r., 1 Johns. Ch. (N. Y.) 288;
Simonson v Falihee, 25 Hun (N. Y.) 570;
Bedford v Tupper, 30 Hun (N. Y.) 174;
Lally v Holland, 1 Swan (Tenn.) 396;
Baldwin v Marshall, 2 Humph. (Tenn.)
 116;
Polk v Cosgrove, 4 Biss. (U. S.) 437;

Riggs v Boylan, 4 Biss. (U. S.) 445;
Sanger v Craigue, 10 Vt. 555.

² *Mutual Life Ins. Comp'y v Dake*, 87
 N. Y. 257, aff'g 1 Abb. N. C. (N. Y.)
 381, per Earl, J., p. 264.
 See also, *Hunter v Windsor*, 24 Vt. 327;
Lyman v Edgerton, 29 Vt. 305, holding,
 that under a statute of Vermont,
 making the town liable for the town
 clerk's acts, the town is liable for his
 failure to index a conveyance, to one
 who examined and relied upon the
 index.

³ *Bishop v Schneider*, 46 Mo. 472;
Mut. L. Ins. Comp'y v Dake, 87 N. Y.
 257, aff'g 1 Abb. N. C. (N. Y.) 381;
Bedford v Tupper, 30 Hun (N. Y.) 174;
Commissioners, etc., v Babcock, 5 Oreg.
 472;
Curtis v Lyman, 24 Vt. 338.
 See also, *Chatham v Bradford*, 50 Ga.
 327;
Schell v Stein, 76 Pa. St. 398.

§ 744. **Refusal to permit inspection of records ; liability for furnishing incorrect copies.**—It is the duty of a clerk, or other officer having charge of public records, upon reasonable and proper application, to allow any person to inspect the records and other papers in his office, and to take abstracts or copies of the same; and he is liable to an action for his refusal so to do.¹ But this duty is subject to such reasonable regulations and limitations, as may be necessary for the safety of the records and other papers, and the proper transaction of the business of the office.² It is also the duty of such an officer, upon reasonable request, and payment of his fees, to furnish, to any person applying therefor, searches, and copies of the records and other papers in his office; and for his failure so to do, or his negligence in furnishing incorrect or imperfect searches or copies, he is liable to an action.³

(5.) CLERK OF A COURT.

§ 745. **Reference to cases cited elsewhere ; nature and extent of his liability.**—Rulings, respecting the judicial or ministerial character of particular functions, exercised by a clerk of a court, will be found in former chapters.⁴ The rules, respecting the clerk's liability or

¹ *Burton v Tuite*, 78 Mich. 363;
Lum v McCarty, 39 N. J. L. 287, over-
 ruling *Fleming v Hudson Co. Clerk*,
 30 N. J. L. 280;

Lyman v Windsor, 24 Vt. 575.

Hanson v Eichstaedt, 69 Wis. 538.

The same rule was applied to the United States Commissioner of Patents, in *Boyden v Burke*, 14 Eow. (U. S.) 575, wherein it was also held, that the officer is not bound to comply with a demand made in an insulting manner; but a subsequent proper demand by the same person, although not accompanied with any apology for his previous improper conduct, will lay the foundation of an action.

² So ruled upon mandamus, *People v Reilly*, 38 Hun (N. Y.) 429;
People v Richards, 99 N. Y. 620.

See also, *Webber v Townley*, 43 Mich. 534, as qualified by *Burton v Tuite*, 78 Mich. 363, at p. 374;

Chase v Heaney, 70 Ill. 268.

³ *Smith v Holmes*, 54 Mich. 104;
Morange v Mix, 44 N. Y. 315;
McCaraher v Comm., 5 Watts. & S. (Pa.) 21;
Ziegler v Comm., 12 Pa. St. 227.

For other rulings, relating to the liability of those officers, see *ante*, §§ 248, 250.

⁴ *Ante*, §§ 208, 231, 233, 242, 249, 291, 529, 539, 540, 614.

immunity from liability in the performance of such acts, may be readily applied to such cases. A few additional cases will be cited. It has been held, that a clerk is not liable for issuing a writ which is a nullity, since no damages to the party can accrue, within the rules of law relating to proximate and remote damages; for the costs and expenses of the ensuing litigation are not the natural and proximate consequence of his issuing the writ.¹ A clerk is not liable for negligence, by reason of his omission of the name of one of the appellees in an appeal bond, where the parties have treated the appeal bond as valid.² A clerk is liable to an action, by the person aggrieved, for misplacing papers filed with him, so that they cannot be found in the appropriate place, when required; although, when handed in to be filed, they were in a package with other papers.³ In many respects, the duties, and consequently the liabilities, of the clerk of a court are the same as those of a recording officer, and the rulings cited in the last preceding subdivision apply thereto. Indeed, in some of the cases there cited, the question arose upon the duties or liabilities of the clerk of a court.

(6.) ELECTION OFFICER.

§ 746. **His functions ministerial; refusal to receive vote; English statutes; Massachusetts statute.**—It was stated in a previous chapter, that the decision of inspectors or judges of election, as to the admission of a vote, or of county canvassers, as to the result of an election, and the making of returns by election officers, are ministerial acts.* The questions which have arisen, respecting the liability of an election officer to a private action, have usually been presented in a case, where a

¹ *Eslava v Jones*, 83 Ala. 139.

⁴ *Ante*, § 538.

² *People v Leaton*, 121 Ill. 666.

See also, *ante*, §§ 153, 154, 156.

³ *Rosenthal v Davenport*, 38 Minn. 543.

qualified voter has brought an action against the inspectors or judges of the election, for refusing his vote; and it follows, from the ruling stated, that such an action can generally be maintained. But in some states, a statute has vested election officers with *quasi* judicial powers, with respect to either the entire subject of receiving or rejecting a vote, or declaring the result of the election, or with respect to some of the proceedings in the conducting of the election. Where that has been done, of course no action lies, unless, perhaps, where the officer has acted maliciously. Thus, the English statute, in force before the statute 2 William IV, ch. 45, required the returning officer to make, under oath, a return of that person as elected, who, in his judgment, had the majority of legal votes. This provision referred to the judgment of the returning officer, the question, whether a particular person was a legal voter, and so rendered his action thereupon of a judicial character.¹ So, in Massachusetts, the statute now exempts the selectmen from liability for refusing a vote, unless the person offering it shall furnish them "sufficient evidence" of his qualifications; and the courts have ruled, that this provision imposes upon the selectmen the duty of deciding, in the first place, as to the sufficiency of the proof presented; and that, in an action against them for refusing a vote, the jury is to determine whether the proof was "sufficient."² Before that statute, it was held, that the selectmen were absolutely liable, if the person, whose vote was refused by them, was a qualified voter, although they acted without malice.³ Under the statute, it has been

¹ Rogers on Elections, 246;
Tozer v Child, 7 El. & Bl. 377; 26 L. J.,
Q. B., 151; 3 Jur. N. S. 409.

² Blanchard v Stearns, 5 Met. (Mass.) 298.

³ Kilham v Ward, 2 Mass. 236;
Gardner v Ward, 2 Mass. 244 note;
Lincoln v Hapgood, 11 Mass. 350;

Oakes v Hill, 10 Pick. (Mass.) 333;
Keith v Howard, 24 Pick. (Mass.) 292.
See also, Capen v Foster, 12 Pick.
(Mass.) 485;
Gates v Neal, 23 Pick. (Mass.) 308;
Bacon v Benchley, 2 Cush. (Mass.) 100;
Lombard v Oliver, 3 Allen (Mass.) 1,
per Bigelow, Ch. J., p. 3.

held, that an action lies against the selectmen, for wrongfully erasing the name of a person from the registry of the voters, he being a qualified voter, and having previously furnished to them "sufficient" evidence of his qualification;¹ and this, although the statute makes such an act highly penal.²

§ 747. **The same subject; the Maine statute.**—So, also, in some of the other states, special provision is made by statute, limiting the right of action against election officers for refusing a vote; as in Maine, where the selectmen are made liable only for "unreasonable, corrupt, or wilfully oppressive" conduct, in the refusal to receive a qualified elector's vote. Under that statute, it has been held, that they are not liable, although their action was corrupt or wilfully oppressive, if it was not unreasonable; that the question is, not whether the officers' acts appeared to them to be reasonable, but whether such acts were reasonable in fact; that ignorance is not a legal excuse; but where their conduct is unreasonable, but not corrupt, punitive damages will not be given against them;³ and that the refusal to permit a qualified elector to vote, because another had personated him, and voted in his name at the same election, is unreasonable and renders them liable.⁴

§ 748. **The same subject; rulings where statute complied with, or in the absence of statute.**—But in the absence of any statutory restriction upon the right of action, the better opinion appears to be, although the cases are not harmonious, that inspectors of election, selectmen, judges of election, or other officers controlling the reception or rejection of the votes, are liable to an action by a qualified voter for rejecting his vote, if he has taken the pre-

¹ *Larned v Wheeler*, 140 Mass. 390, citing *Lombard v Oliver*, 3 Allen (Mass.) 1; s. c. 7 Allen (Mass.) 155; *Harris v Whitcomb*, 4 Gray (Mass.) 433.

² *Id.*; and see *Blanchard v Stearns*, 5 Met. (Mass.) 298.

³ *Sanders v Getchell*, 76 Me. 158;

⁴ *Pierce v Getchell*, 76 Me. 216

scribed oath, and answered such questions as the statute allows them to put to him, and otherwise complied with the statutory regulations as to registry, etc.; and this, not only without any allegation or proof of malice, but even where they affirmatively show, that they acted honestly and in good faith. Thus, where the constitution of a state provided, that only white male inhabitants should vote, and the inspectors decided that a particular voter was not white, and so rejected his vote; the court held, that they were liable, as the evidence showed that he was white, although they acted without malice, and in the belief that they were discharging their official duty.¹ So, where a person offering his vote was challenged, on the ground that he was a deserter from the United States military service, and therefore disqualified under an act of congress to that effect; the court holding, in accordance with former decisions, that the only competent evidence of the fact was a duly authenticated record of his conviction, held also, that the inspectors were liable for refusing to receive his vote, after he had taken the preliminary oath, prescribed by the statute to be taken upon a challenge, and had answered the other questions which the statute allows the inspectors to ask, as to his residence, etc., and had refused to answer other questions, relating to the challenge on the ground of desertion.² Other cases, to the same effect, are given in the note.³

¹ *Anderson v Millikin*, 9 Ohio St. 568.

² *Goetcheus v Matthewson*, 61 N. Y. 420, rev'g 58 Barb. (N. Y.) 152; 5 Lans. (N. Y.) 214.

³ *Ashby v White*, 2 Ld. Ray. 938; 6 Mod. 45; 1 Salk. 19;

Pryce v Belcher, on demurrer, 3 C. B. 58; 4 D. & L. 238; 15 L. J., C. P. 305; 11 Jur. 675; s. c., on motion for judgment *non obst. ver.*, 4 C. B. 867; 16 L. J., C. P. 264;

Pickering v James, 8 L. R., C. P. 489;

42 L. J., C. P. 217; 21 W. R. 786; 29 L. T. 210;

Spragins v Houghton, 3 Ill. 377;

Bernier v Russell, 89 Ill. 60;

State v Robb, 17 Ind. 536;

Jeffries v Ankeny, 11 Ohio 372;

Monroe v Collins, 17 Ohio St. 665;

Gillespie v Palmer, 20 Wis. 544.

See also, *Murphy v Ramsay*, 114 U. S. 15, and the Mass. cases, cited in the notes to § 746, *ante*, also the cases cited *ante*, § 538.

§ 749. **The same subject: existence of malice.**—On the other hand, it has been held, in several cases, that election officers are liable to an action for refusing a qualified voter's vote, on proof of malice; and in others, that they are only liable on proof of malice; in some, because their powers are thought to be judicial, and in others, without expressly deciding that particular point.¹ Where proof of malice is deemed necessary, it is not requisite that it should be directly proved; it may be inferred from circumstances; and every fact and circumstance should go to the jury in proof thereof, and the defendants may rebut such testimony, by circumstances showing good intent. Thus, "the fact, that the inspectors differed from the voter in political sentiments, may be considered by the jury."²

§ 750. **Registration officers; their liability.**—An action will not lie against the selectmen, for refusing to put upon the list the name of a person, who was not in fact a qualified voter, although he produced *prima facie* evidence that he was so qualified; and the fact that he was not qualified may be proved at the trial.³ But an action lies against them, for refusing to put a qualified voter's name upon the list, while they are in session to revise it, although he does not afterwards offer his vote; unless they

¹ *Carter v Harrison*, 5 Blackf. (Ind.) 138;
Caulfield v Bullock, 18 B. Mon. (Ky.)
494;

Morgan v Dudley, 18 B. Mon. (Ky.) 693;

Miller v Rucker, 1 Bush (Ky.) 135;

Chrisman v Bruce, 1 Duv. (Ky.) 63;

Bridge v Oakey, 2 La. Ann. 968;

Dwight v Rice, 5 La. Ann. 580;

Patterson v D'Auterive, 6 La. Ann. 487;

Elbin v Wilson, 33 Md. 135;

Friend v Hamill, 34 Md. 298;

Pike v Megoun, 44 Mo. 491;

Wheeler v Patterson, 1 N. H. 88;

Peavey v Robbins, 3 Jones L. (N. C.)
339;

Weckerly v Geyer, 11 S. & R. (Pa.) 35

Keenan v Cook, 12 R. I. 52;

Rail v Potts, 8 Humph. (Tenn.) 225;

Fausler v Parsons, 6 W. Va. 486.

² *Goetcheus v Matthewson*, 61 N. Y. 420,
per Dwight, Com'r, p. 441; and *Elbin*
v Wilson, 33 Md. 135; *Friend v*
Hamill, 34 Md. 298, there cited.
As to the sufficiency of the proof
of the rejection of the vote, see
Gates v Neal, 23 Pick. (Mass.) 308.

³ *Lombard v Oliver*, 7 Allen (Mass.) 155.
See also, *ante*, § 136.

have reconsidered their decision, and placed his name on the list, before the opening of the election; in which case they are not liable.¹ And an action lies against selectmen, in favor of a person, whose name has been wrongfully erased by them from the registry of the voters.² But it has also been held, that an action will not lie against registration officers, for refusing to enter a qualified voter's name upon the registry list, even, *semble*, if their action was malicious or corrupt.³

(7.) POSTMASTER.

§ 751. **Instances of liability.**—A case, wherein it was ruled, that the publisher of a newspaper could not maintain an action against a postmaster, for failing to give him the publication of the list of letters uncalled for, was given at length in a previous section of this chapter.⁴ But it has been held, in several cases, that in the discharge of his ordinary functions, a postmaster is a mere ministerial officer, who owes to each individual the duty to deliver to him, all mail matter addressed to him, received at the postmaster's office; and that an action will lie for a failure so to do.⁵ And the facts, that the mail matter thus received was a newspaper, on the wrapper of which there was a mark; and that the postmaster was required by an act of congress to collect letter postage on a newspaper, marked so as to communicate information, do not convert him into a *quasi* judicial officer, so as to protect him from an action, where he erroneously decided that the mark in question was within the act of congress, and demanded letter postage, before delivering the package, although he acted with-

¹ *Bacon v Benchley*, 3 Cush. (Mass.) 11.
See also, *Waite v Woodward*, 10 Cush.
(Mass.) 143.

² *Larned v Wheeler*, 140 Mass. 390.
See also, *Harris v Whitcomb*, 4 Gray
(Mass.) 433.

³ *Fausler v Parsons*, 6 W. Va. 486.

⁴ *Ante*, § 708.

⁵ *Rowning v Goodchild*, 2 W. Blackst.
906;
Smith v Powdich, 1 Cowp. 182.

out fraud or malice.¹ So a postmaster, and *semble*, also a letter carrier, and a contractor for carrying the mail, is liable to a person whose letter is lost, through his negligence, after it came to his hands; but the postmaster is not liable, if the loss was caused by the negligence of one of his subordinates, appointed pursuant to law, unless his own careless or improper management of his office contributed to the loss.²

§ 752. **The same subject.**—Where a post office clerk receives a letter containing money, to be sent as a registered letter, and, on finding that registered letters cannot be sent to the post office to which it is directed, sends it by the ordinary mail, by direction of his superior, both are liable to the sender, in case of loss.³ The United States statute, providing for the payment to the order of the postmaster-general, for the benefit of the owner, of money taken from the mails by theft or robbery, which comes to the possession of any agent of the post office department, applies to the proceeds of such money; and a bill in equity will not lie against a postmaster, by a person who had stolen money from the mail, to enforce a trust deed, executed by the plaintiff, conveying to the defendant the proceeds of such money, in trust to pay claims arising out of the theft, and to pay the balance to the plaintiff.⁴

¹ *Teall v Felton*, 1 N. Y. 537; *aff'd* 12 How. (U. S.) 284.

² *Maxwell v McIlvoy*, 2 Bibb (Ky.) 211; *Keenan v Southworth*, 110 Mass. 474; *Ford v Parker*, 4 Ohio St. 576; *Sawyer v Corse*, 17 Gratt. (Va.) 230; distinguishing or disapproving *Conwell v Vorhees*, 13 Ohio, 525; *Hutchins v Brackett*, 22 N. H. 252.

See also, *Bishop v Williamson*, 11 Me. 495;

Wiggins v Hathaway, 6 Barb. (N. Y.) 632;

Bolan v Williamson, 1 Brev. (S. C.) 181. As to the postmaster-general's liability, see *Whitfield v Le Despencer* (Lord), 2 Cowp. 754, wherein Lord Mansfield gives a learned account of the origin, etc., of the post office; *Lane v Cotton*, 1 Salk. 17; 1 Ld. Raym. 646;

Dunlop v Munroe, 7 Cranch (U. S.) 242. And, generally, see *ante*, § 592.

³ *Fitzgerald v Burrill*, 106 Mass. 446.

⁴ *Laws v Burt*, 129 Mass. 202.

(8.) SHERIFF, MARSHAL, CORONER, CONSTABLE.

§ 753. **References to rulings cited elsewhere.**—The rules of law, relating to the powers, duties, and liabilities of sheriffs, constables, and other officers exercising similar functions, cover a vast field, and are fully considered in many treatises specially devoted thereto. As the plan of this work excludes subjects, which are thus considered in special treatises, a mere glance at the general rules, relating to the liability of an officer of that description to a private action, is all that is required here. Many cases, relating to that subject, have been incidentally considered in the former chapters of this work;¹ and others will be given in that portion of this chapter, which treats of the rules relating to the protection of an officer by his process.²

§ 754. **Their ordinary functions ministerial; extent and nature of liability.**—The ordinary functions of those officers consist of the execution of process, or other mandates of a court or judicial officer, and are strictly regulated and defined by the terms of the process or mandate, and the rules of law relating thereto, generally embodied in statutes. Those functions are, therefore, with few exceptions, purely ministerial; and the general rules, respecting the liability of an officer exercising ministerial powers, apply to such officers to the full extent. A liability against such an officer may accrue, either (1) to the person in whose favor the process or mandate was issued; or (2) to the person against whom it was issued; or (3) to a stranger. As a general, but by no means universal rule, a liability of the latter description does not arise, in the due execution of the process or other mandate which the officer holds, but from some wrongful act, under color or pretext thereof. A particular act or neglect may render the officer liable to each of the parties, to the

¹ *Ante*, §§ 242, 252, 291, 561.

² *Post*, §§ 756, *et seq.*

process or mandate in his hands; as where, after lawfully levying upon property under an execution, he negligently suffers it to be lost, destroyed, or taken away; in which case, he would be liable to the judgment creditor for the value of the property, not exceeding the amount of the judgment, and to the judgment debtor for any surplus. As a general rule, the officer acts at his peril, and he is not excused from liability by his honesty or good faith; as where he seizes goods of a stranger to the process, relying upon appearances, which might have misled any one;¹ or arrests a person, other than the person intended to be described in the writ, although both bear the same name;² unless the person arrested has led him into the error, as where he answers in the affirmative, a question, whether he is the person described; but it seems, that he is liable for detaining a person so arrested after he learns that he is not the person intended.³

§ 755. **References to rulings cited elsewhere, respecting the liability of other officers.**—This examination of the rulings, applicable to particular officers, might be extended to a very great length, by embracing other officers, and including additional authorities, applicable to the officers already mentioned. But enough has been written, to illustrate fully the force and application of the general principles stated in the first division of this chapter. The chapters, relating to the liabilities of sureties in official bonds;⁴ and to the nature and extent of official powers;⁵ contain many other adjudications, upon the

¹ *Davies v Jenkins*, 11 M. & W. 745;
Glasspoole v Young, 9 Barn. & Cr. 696;
Saunderson v Baker, 3 Wils. 309;
Edwards v Bridges, 2 Stark. 348;
Walcot v Pomeroy, 2 Pick. (Mass.) 121;
Hallowell, etc. Bank v Howard, 14
 Mass. 181;
Weber v Henry, 16 Mich. 399;
Kingsbury v Pond, 3 N. H. 511.

² *Jarmain v Hooper*, 6 M. & G. 827;
Comer v Knowles, 17 Kan. 436.
 See however, *O'Shaughnessy v Baxter*,
 121 Mass. 515, cited *post*, § 765.

³ *Dunston v Paterson*, 2 C. B., N. S. 495;
Formwalt v Hylton, 66 Tex. 288.

⁴ *Ante*, ch. 12.

⁵ *Ante*, ch. 23.

liability of particular public officers to, or their immunity from, private actions, and the same subject will be further considered in the next succeeding division.

III. Protection of a ministerial officer by his process.

§ 756. **General principle ; meaning of word “process.”**—As a ministerial officer is bound to execute process, issued to him by competent authority, in a case where power to execute the same is conferred upon him by law, it follows, that he is protected in executing the same, pursuant to the command thereof, whatever injury may accrue to an individual, from his acts in pursuance thereof. And in the application of this rule, the word “process” is not used, in its ordinary restricted sense of a writ or precept, issuing from a court or magistrate, or other judicial officer; but it is used “in a very comprehensive sense, and will include any writ, warrant, order, or other authority, which purports to empower a ministerial officer to arrest the person, or to seize or enter upon the property, of an individual, or to do any act in respect to such person or property, which, if not justified, would constitute a trespass.”¹ This proposition will be illustrated by the adjudications hereafter cited.

§ 757. **The accepted doctrine is of recent date ; Sava-cool v. Boughton.**—The accepted doctrine upon this subject, at least as it respects the process of a court of special or inferior jurisdiction, is so modern, that the court of King’s Bench left it unsettled, in a case which was decided in 1734.² And in the year 1830, the rule was first settled in the state of New York, and only by overruling some former adjudications. In the case referred to, which is considered as the leading American case on the subject, *Marcy, J.*, after a long and careful discussion

¹ Cooley on Torts, 2d ed., 539, 540 (*461.)

331; Cas. temp. Hardwicke, 62;

² *Smith v Bouchier*, 2 Stra. 993; 2 Barn

Cunn. 89, 127; 2 Kelyng, 144, pl. 123.

of the question, upon principle and authority established, with the concurrence of other members of the court, the following propositions, which have now become universally recognized:

“1. That where an inferior court has not jurisdiction of the subject matter, or, having it, has not jurisdiction of the person of the defendant, all its proceedings are absolutely void; neither the members of the court, nor the plaintiff (if he procured or assented to the proceedings,) can derive any protection from them, when prosecuted by a party aggrieved thereby.

“2. If a mere ministerial officer executes any process, upon the face of which it appears, that the court which issued it had not jurisdiction of the subject matter, or of the person against whom it is directed, such process will afford him no protection for acts done under it.

“3. If the subject matter of a suit is within the jurisdiction of a court, but there is a want of jurisdiction as to the person or place, the officer who executes process issued in such suit is no trespasser, unless the want of jurisdiction appears by such process.”¹

§ 758. **Officer protected in execution of a process “fair on its face.”**—These rules, it will be noticed, relate entirely to the protection of an officer, executing process issued by a court; but the same principles have been extended, so as to apply to process, in the liberal sense of the word which has been already given. The modern rule has been correctly stated as follows: “The process, that shall protect an officer, must, to use the customary

¹ *Savacool v Boughton*, 5 Wend. (N. Y.) 170.

Distinguishing, explaining, disproving, or overruling, dicta or decisions, in

Borden v Fitch, 15 Johns. (N. Y.) 121;

Cable v Cooper, 15 Johns. (N. Y.) 159

Smith v Shaw, 12 Johns. (N. Y.) 257;

Suydam v Keys, 13 Johns. (N. Y.) 444;

Gold v Bissell, 1 Wend. (N. Y.) 210;

Elliott v Peirsol, 1 Pet. (U. S.) 328;

Wise v Withers, 3 Cranch (U. S.) 331;

Approving Warner v Shed, 1 Johns. (N. Y.) 138;

Beach v Furman, 9 Johns. (N. Y.) 229.

legal expression, be *fair on its face*. By this . . . is intended, that it shall apparently be process lawfully issued, and such as the officer might lawfully serve. More precisely, that process may be said to be fair on its face, which proceeds from a court, magistrate, or body, having authority of law to issue process of that nature; and which is legal in form; and on its face contains nothing, to notify or fairly apprise the officer that it was issued without authority. When such appears to be the process, the officer is protected in making service, and he is not concerned with any illegalities, which may exist back of it." ¹ This doctrine has been settled by a large number of adjudications, in England and in the United States, wherein the question, whether the officer was protected by his process, has arisen, not only upon process issuing from a court or a judicial officer, but upon any other warrant, precept, or order, issued by an officer or body of officers, possessing *quasi* judicial power. These adjudications, except a few which are hereinafter examined in detail, are collected in the note.²

¹ Cooley on Torts, 2d ed., 538 (*459, 460).

² Hill v Bateman, 2 Str. 710;
Ladbroke v Crickett, 2 T. R. (D. & E.)
649; p. 653, per Buller, J.;
Laroche v Wasbrough, 2 T. R. (D. & E.)
737;
Parsons v Loyd, 3 Wils. 341; *
Ives v Lucas, 1 C. & P. 7;
Andrews v Marris, 1 Q. B. (Ad. & E.,
N. S.) 3;
Magnay v Burt, 5 Q. B. (Ad. & E., N. S.)
381; Dav. & Meriv., 652; 7 Jur. 1,116;
Cogburn v Spence, 15 Ala. 549;
Lott v Hubbard, 44 Ala. 593;
Norcross v Nunan, 61 Cal. 640;
Thames Manuf'g Comp'y v Lathrop,
7 Conn. 550;
Watson v Watson, 9 Conn. 140;
Prince v Thomas, 11 Conn. 472;
Neth v Crofut, 30 Conn. 580;
Chipstead v Porter, 63 Ga. 220;

Roth v Duvall, 1 Idaho 149;
Lattin v Smith, 1 Ill. 361;
Brother v Cannon, 2 Ill. 200;
Shaw v Dennis, 10 Ill. 405;
Hill v Figley, 25 Ill. 156;
Smith v People, 99 Ill. 445;
Davis v Bush, 4 Blackf. (Ind.) 330;
Gott v Mitchell, 7 Blackf. (Ind.) 270;
Noland v Busby, 28 Ind. 154;
Brainard v Head, 15 La. Ann. 489;
Kellar v Savage, 20 Me. 199;
Tremont School Dist. v Clark, 33 Me.
482;
State v McNally, 34 Me. 210;
Caldwell v Hawkins, 40 Me. 526;
Jenkins v Reed, 48 Me. 386;
Bethel v Mason, 55 Me. 501;
Nowell v Tripp, 61 Me. 426;
Seekins v Goodale, 61 Me. 400;
Lashus v Matthews, 75 Me. 446;
Nichols v Thomas, 4 Mass. 232;

§ 759. **Officer's bad faith or knowledge of defects does not prejudice him.**—Under the rule, as now settled, it

- Colman *v* Anderson, 10 Mass. 105 ;
 Holden *v* Eaton, 8 Pick. (Mass.) 436 ;
 Sprague *v* Bailey, 19 Pick. (Mass.) 436 ;
 Sturbridge *v* Winslow, 21 Pick. (Mass.) 83 ;
 Upton *v* Holden, 5 Met. (Mass.) 360 ;
 Wilmarth *v* Burt, 7 Met. (Mass.) 257 ;
 Aldrich *v* Aldrich, 8 Met. (Mass.) 102 ;
 Donahoe *v* Shed, 8 Met. (Mass.) 326 ;
 Twitchell *v* Shaw, 10 Cush. (Mass.) 46 ;
 Clarke *v* May, 2 Gray (Mass.) 410 ;
 Hays *v* Drake, 6 Gray (Mass.) 387 ;
 Howard *v* Proctor, 7 Gray (Mass.) 123 ;
 Williamstown *v* Willis, 15 Gray (Mass.) 427 ;
 Cheever *v* Merritt, 5 Allen (Mass.) 563 ;
 Chase *v* Ingalls, 97 Mass. 524 ;
 Bergin *v* Hayward, 102 Mass. 414 ;
 Underwood *v* Robinson, 106 Mass. 296 ;
 Wall *v* Trumbull, 16 Mich. 228 ;
 Bird *v* Perkins, 33 Mich. 28 ;
 Dunn *v* Gilman, 34 Mich. 256 ;
 Wood *v* Thomas, 38 Mich. 686 ;
 Byles *v* Genung, 52 Mich. 504 ;
 Orr *v* Box, 22 Minn. 485 ;
 State *v* Spencer, 30 Mo. App. 407 ;
 Milburn *v* Gilman, 11 Mo. 64 ;
 Turner *v* Franklin, 29 Mo. 285 ;
 Glasgow *v* Rowse, 43 Mo. 479 ;
 St. Louis Building, etc., Ass'n *v* Lightner, 47 Mo. 393 ;
 State *v* Dulle, 48 Mo. 282 ;
 Walden *v* Dudley, 49 Mo. 419 ;
 Ranney *v* Bader, 67 Mo. 476 ;
 Philips *v* Spotts, 14 Nebr. 139 ;
 Blanchard *v* Goss, 2 N. H. 491 ;
 Henry *v* Sargeant, 13 N. H. 321 ;
 State *v* Weed, 21 N. H. 262 ;
 Keniston *v* Little, 30 N. H. 318 ;
 Kelley *v* Noyes, 43 N. H. 209 .
 Weiner *v* Van Rensselaer, 43 N.J.L. 547 ;
 Hann *v* Lloyd, 50 N. J. L. 1 ;
 Warner *v* Shed, 10 Johns. (N. Y.) 138 ;
 Savacool *v* Boughton, 5 Wend. (N. Y.) 170 ;
 Wilcox *v* Smith, 5 Wend. (N. Y.) 231 ;
 McGuinty *v* Herrick, 5 Wend. (N. Y.) 240 ;
 Lewis *v* Palmer, 6 Wend. (N. Y.) 367 ;
 Alexander *v* Hoyt, 7 Wend. (N. Y.) 89 ;
 Reynolds *v* Moore, 9 Wend. (N. Y.) 35 ;
 Coon *v* Congden, 12 Wend. (N. Y.) 496 ;
 Parker *v* Walrod, 16 Wend. (N. Y.) 514 ;
 Earl *v* Camp, 16 Wend. (N. Y.) 562 ;
 Hart *v* Dubois, 20 Wend. (N. Y.) 236 ;
 Stewart *v* Hawley, 21 Wend. (N. Y.) 552 ;
 Webber *v* Gay, 24 Wend. (N. Y.) 485 ;
 Noble *v* Holmes, 5 Hill (N. Y.) 194 ;
 People *v* Warren, 5 Hill (N. Y.) 440 ;
 Cornell *v* Barnes, 7 Hill (N. Y.) 35 ;
 Bennett *v* Burch, 1 Denio (N. Y.) 141 ;
 Abbott *v* Yost, 2 Denio (N. Y.) 86 ;
 Dunlap *v* Hunting, 2 Denio (N. Y.) 643 ;
 Foster *v* Pettibone, 20 Barb. (N. Y.) 356 ;
 Patchin *v* Ritter, 27 Barb. (N. Y.) 34 ;
 Grady *v* Bowe, 11 Daly (N. Y.) 259 ;
 Bovee *v* King, 11 Hun (N. Y.) 250 ;
 Livingston *v* Miller, 48 Hun (N. Y.) 232 ;
 Sheldon *v* Van Buskirk, 2 N. Y. 473 ;
 Kerr *v* Mount, 23 N. Y. 659 ;
 Porter *v* Purdy, 29 N. Y. 106 ;
 National Bank *v* Elmira, 53 N. . 49 ;
 Hill *v* Haynes, 54 N. Y. 153 ;
 Bradley *v* Ward, 58 N. Y. 401 ;
 Clearwater *v* Brill, 63 N. Y. 627 ;
 Cody *v* Quinn, 6 Ired. L. (N. C.) 191 ;
 State *v* Lutz, 65 N. C. 503 ;
 Gore *v* Mastin, 66 N. C. 371 ;
 Loomis *v* Spencer, 1 Ohio St. 153 ;
 Moore *v* Allegheny City, 18 Pa. St. 55 ;
 Billings *v* Russell, 23 Pa. St. 189 ;
 Cunningham *v* Mitchell, 67 Pa. St. 78 ;
 State *v* Jervay, 4 Strobb. (S. C.) 304 ;
 Rainey *v* State, 20 Tex. App. 455 ;
 Erskine *v* Hohnbach, 14 Wall. (U.S.) 613 ;
 Bailey *v* Railroad Comp'y, 22 Wall. (U. S.) 604 ;
 Matthews *v* Densmore, 109 U. S. 216 ;
 Pierson *v* Gale, 8 Vt. 509 ;
 Watkins *v* Page, 2 Wis. 92 ;
 McLean *v* Cook, 23 Wis. 364 ;
 Stahl *v* O'Malley, 39 Wis. 323 .

matters not, that the officer knew, that in the particular case, the process was issued without authority, if it appears upon its face to be such, as the court, body, or officer, issuing the same, has power to issue; as where it was issued upon a judgment, which was obtained by fraud;¹ or irregularity.² So, where an officer, before the civil war, arrested a negro, under a warrant, regular on its face, and which it was his duty to execute, as a fugitive from justice from a southern state, and declared that his warrant for that purpose was only a pretext to procure the custody of the negro; that he knew that the latter had not committed the crime of which he was charged; but that he was a fugitive slave, and the officer held a power of attorney from his master, to seize him and return him;³ or where the officer knew that the judgment, upon which the process was issued, was recovered in a case where there was no lawful cause of action;⁴ or that the judgment had been paid, before the execution thereupon was issued.⁵ Thus, in a case decided by the supreme court of New York, the defendant was convicted of an assault and battery upon a constable, by forcibly resisting an arrest upon a warrant, issued by the inspectors of election, for disturbing an election by disorderly conduct in their presence. He offered to prove, upon the trial, that he had not been in the presence or hearing of the inspectors, at any time during the election, and that the constable knew that such was the case; but the evidence was excluded. Upon a certiorari to the court below, the conviction was affirmed by the supreme court, although it was conceded that this evidence went to the jurisdiction of the inspectors; the court holding,

¹ *Baker v Sheehan*, 29 Minn. 235.

² *Bensel v Lynch*, 44 N. Y. 162.

³ *Comm. v Tracy*, 5 Met. (Mass.) 536.

⁴ *Watson v Watson*, 9 Conn. 140.

⁵ *Wilmarth v Burt*, 7 Met. (Mass.) 257 ;
Twitchell v Shaw, 10 Cush. (Mass.) 46 ;
Lewis v Palmer, 6 Wend. (N. Y.) 367 ;
Mason v Vance, 1 Sneed (Tenn.) 178.

that as the warrant was regular on its face, the defendant had no right to resist the officer, and that an "officer is protected by process, regular and legal upon its face, whatever he may have heard, going to impeach it."¹ And the rule applied, before the civil war, to an officer, holding a warrant, issued by a United States commissioner, under the fugitive slave law.²

§ 760. **The same subject ; adverse rulings.**—But the cases are not entirely harmonious upon this question. It has been held, in Illinois, that a ministerial officer (in this case a tax collector,) is not protected by his process, although it is fair on its face, where he has knowledge that the antecedent proceedings were so defective, that it is void in law.³ And in Wisconsin, the same rule has been applied to an officer holding an execution, who has knowledge of a jurisdictional defect, which renders the judgment void.⁴ And in Vermont, it seems to have been held, that a tax bill and warrant, although regular on the face thereof, do not protect a tax collector, unless he shows that the antecedent proceedings were taken according to law.⁵

§ 761. **The same subject ; criticism of adverse cases.**—The rulings, cited in the last preceding section, are so opposed to the weight of the American authorities, as to constitute local exceptions to the general rule. With respect to a tax collector, it has been uniformly held elsewhere, that his warrant is process, under the rule, if it is fair on its face, and he is not deprived of its protection by any antecedent errors or defects in the proceedings, whether known to him or not known; much less is he

¹ *People v Warren*, 5 Hill (N. Y.) 440.

² *Henry v Lowell*, 16 Barb. (N. Y.) 268.

³ *Leachman v Dougherty*, 81 Ill. 324.

⁴ *Grace v Mitchell*, 31 Wis. 533.

⁵ *Hathaway v Goodrich*, 5 Vt. 65;

Collamer v Drury, 16 Vt. 574;

Shaw v Peckett, 25 Vt. 423;

Downing v Roberts, 21 Vt. 441.

See, however, *Spear Tilson*, 24 Vt. 420.

required to prove affirmatively their regularity. Thus, the court of appeals of New York held, that an action against a tax collector could not be maintained, for levying upon property for nonpayment of a tax, assessed upon a "seminary of learning," (such institutions being exempt from taxation by the statute of that state,) on the ground that the assessors acted within their jurisdiction in determining, even although erroneously, that the plaintiff's seminary was taxable as a dwelling, and therefore the collector was protected by his warrant.¹ The same rule of protection to a tax collector, acting under a warrant apparently regular, has been declared in numerous other cases.²

§ 762. When process "fair on its face."—It has been well said, by the supreme judicial court of Massachusetts, that the cases, where an officer is not protected by his process, are those where the want of authority appears upon the face of the process itself, or a want of jurisdiction arises from the character of the proceedings, which the process itself discloses.³ Where the process does not affirmatively show jurisdiction, or apparent

¹ *Chegaray v Jenkins*, 5 N. Y. 376, aff'g 3 Sandf. (N. Y.) 409.

² *Colman v Anderson*, 10 Mass. 105;
Sprague v Bailey, 19 Pick. (Mass.) 436;
Howard v Proctor, 7 Gray (Mass.) 128;
Rawson v Spencer, 118 Mass. 40;
Abbott v Yost, 2 Denio (N. Y.) 86;
Woolsey v Morris, 96 N. Y. 311.
 See also, *Watson v Watson*, 9 Conn. 140;
Shaw v Dennis, 10 Ill. 405;
Noland v Busby, 28 Ind. 154;
Kellar v Savage, 20 Me. 199;
Caldwell v Hawkins, 40 Me. 526;
Nowell v Tripp, 61 Me. 426;
Wall v Trumbull, 16 Mich. 228;
Bird v Perkins, 33 Mich. 28;
Erskine v Hohnbach, 14 Wall. (U. S.) 613, and other cases hereinafter cited.

³ *Pearce v Atwood*, 13 Mass. 324, p. 342;
Fisher v McGirr, 1 Gray (Mass.) 1;
Chase v Ingalls, 97 Mass. 524;
Comm. v Martin, 105 Mass. 178.
Accord, *Donald v McKinnon*, 17 Fla. 746;
Eames v Johnson, 4 Allen (Mass.) 382;
Warrensburg v Miller, 77 Mo. 56;
Gale v Mead, 4 Hill (N. Y.) 109;
Van Rensselaer v Witbeck, 7 N. Y. 517;
Westfall v Preston, 49 N. Y. 349;
Chalker v Ives, 55 Pa. St. 81;
Hilbish v Hower, 58 Pa. St. 93.
 In *Campbell v Sherman*, 35 Wis. 103, it was held, that where the court assumes jurisdiction under an unconstitutional statute, the officer is not protected by his process.

jurisdiction, the burden of proving jurisdiction, in an action against the officer, falls upon him; and if he succeeds in showing jurisdiction of the subject matter and of the person, his process protects him.¹ And a sheriff, justifying under a regular execution, is not required to show, as against a party to the execution, that any judgment has been recovered.² A tax warrant, signed by two persons, who are not assessors *de jure* or *de facto*, will not protect a collector, levying under authority thereof.³

§ 763. **Officer must act within the command of the process and the rules of law.**—It is essential to the officer's right to protection under his process, that he should proceed in the execution thereof, according to the command thereof, and in the manner directed by law. Thus, unnecessary oppression, in the execution of a lawful process, will render the officer liable to the person injured; as where a tax collector makes a distress which is greatly and obviously excessive,⁴ or a sheriff makes a similar levy under an execution.⁵ So a tax collector, who sells more property than is necessary to satisfy the tax, is liable in trespass for the excess.⁶ So, where the collector of a duty on carriages, having made a distress, sold the same at half its value, in two hours after the seizure, without notice of the time and place of sale; it was held, that although the statute contained no special directions, as to the time and mode of sale, it is a rule of the common law, that a distress must be kept a reasonable time before the sale, and sold for the best price that can be obtained.

¹ *Piper v Pearson*, 2 Gray (Mass.) 120;
Chase v Ingalls, 97 Mass. 524;
Smith v Keniston, 100 Mass. 172.

² *Holmes v Nuncaster*, 12 Johns. (N. Y.) 395;
Crocker on Sheriffs, 3d ed., § 866.

³ *Delaware & H. Canal Comp'y v Atkins*,

121 N. Y. 246, per Finch, J., p.

⁴ *Jewell v Swain*, 57 N. H. 506;
Davis v Webster, 59 N. H. 471.

⁵ *Handy v Clippert*, 50 Mich. 355.
 See also, *Lawson v State*, 10 Ark. 28.

⁶ *Seekins v Goodale*, 61 Me. 400;
Cone v Forest, 126 Mass. 97.

therefor; and that the immediate sale, for a price far below the value, rendered the collector a trespasser *ab initio*.¹ So an officer, who seizes or sells property, at a different time or place, or substantially in different manner, than the process or the statute prescribes, is not protected by his process.² It goes without saying, that an officer, who takes property of a person not named in his process, or property exempt by law from seizure under the process, is not within the rule, that his process protects him, whatever other grounds he may have for the defence of an action against him.

§ 764. **Officer protected by process in arresting a privileged person.**—An officer is protected by his process in arresting, pursuant to the command thereof, a privileged person, for instance, a member of the legislature, or a witness going or returning;³ although he knew that the person arrested was privileged;⁴ or an infant, although he was aware of the infancy.⁵

§ 765. **Rulings where officer arrests the wrong person.**—An officer is not protected by his process, where he arrests the wrong person, in consequence of his mistaking the latter's name;⁶ or in arresting a person not named in the process, although the person arrested was the person intended, the wrong name having been inserted in the process by mistake, unless he was known by that

¹ *Blake v Johnson*, 1 N. H. 91.

² *Veit v Graff*, 37 Ind. 253;
Hayes v Buzzell, 60 Me. 205;
Sawyer v Wilson, 61 Me. 529;
Pierce v Benjamin, 14 Pick. (Mass.) 356;
Smith v Gates, 21 Pick. (Mass.) 55;
Hall v Ray, 40 Vt. 576;
Evarts v Burgess, 48 Vt. 205;
Buzzell v Johnson, 54 Vt. 90.

³ *Cameron v Lightfoot*, 2 W. Blackst. 1,190;
Tarlton v Fisher, 2 Dougl. 671;

Smith v Jones, 76 Me. 138.

See also, *Carle v Delesdernier*, 13 Me. 363;
Chase v Fish, 16 Me. 132;
Secor v Bell, 18 Johns. (N. Y.) 52;
Sperry v Willard, 1 Wend. (N. Y.) 32.

⁴ *Magnay v Burt*, 5 Q. B. (Ad. & E., N. S.) 381; *Dav. & M.* 652; 7 Jur. 1,116, and cases cited.
 See also, *Yearsley v Heane*, 12 M. & W. 322; 3 D. & L. 265.

⁵ *Cassier v Fales*, 139 Mass. 461.

⁶ *Cooter v Bronson*, 67 Barb. (N. Y.) 444.

name as well as by his real name;¹ or unless the officer was misled by the person arrested, as where the latter stated that he was the person described.² So, where it appeared on the face of a warrant of attachment, that the first names of the defendants were fictitious, it was held, that the process showed upon its face that it was issued without authority, and consequently that it did not protect the officer.³ But where an action was brought upon a note signed by one John Shaughnessy, and the summons was served upon another person, whose real name was John O'Shaughnessy, but who was commonly known as John Shaughnessy; and judgment was taken in the action, and an execution issued thereupon, and delivered to an officer with instructions to arrest O'Shaughnessy; and the officer, knowing that he was not the person who signed the note, but having ascertained that he was the person on whom the summons was served, arrested him accordingly; it was held that an action would not lie against an officer. The court said: "The officer, acting in good faith, had the right to rely for his protection upon the process put into his hands, and was not bound to go behind that process, and so assume the risk of determining the question, whether the plaintiff really signed the note upon which the action was brought, or the truth of any extrinsic fact, which would exempt him from being imprisoned upon the execution." ⁴

§ 766. **Quere, as to officer in replevin taking goods from a stranger.**—It has been said, if not held, that where an officer holds a writ of replevin, or other similar

¹ *Shadgett v Clipson*, 8 East 328;
Nichols v Thomas, 4 Mass. 232;
Griswold v Sedgwick, 6 Cow. (N. Y.)
 456; s. c., 1 Wend. (N. Y.) 126;
Mead v Haws, 7 Cow. (N. Y.) 332;
Gurnsey v Lovell, 9 Wend. (N. Y.) 319;
Scheer v Keown, 29 Wis. 586.
 See also, *Johnston v Riley*, 13 Ga. 97;

McMahan v Green, 34 Vt. 69.

² *Formwalt v Hylton*, 66 Tex. 288.
 See also, *Price v Harwood*, 3 Campb.
 108.

³ *Patrick v Solinger*, 9 Daly (N. Y.) 149.

⁴ *O'Shaughnessy v Baxter*, 121 Mass. 515.

process under the code of civil procedure, which commands him to seize certain chattels specified therein, without any qualifying words, relating to the person in whose possession the chattels may be found, he is protected by his process, in taking them from the possession of a stranger to the action.¹ But the weight of authority is the other way; and the better opinion is that the process must be understood, if it does not so expressly state, as limiting the power of officer to seize the chattels, to the case, where they are found in the possession of the defendant or his agent.²

§ 767. Where process contains alternative provisions, one lawful and one unlawful.—If the process contains alternative directions, of which one is lawful, and the other is unlawful, the officer is protected, if he obeys the lawful direction, but not if he obeys the unlawful one;³ but where the law confers upon him a discretion as the mode of executing it, he is not liable for adopting any lawful mode, although he does so from improper motives.⁴ So a lawful process protects an officer, for any act lawfully done thereunder, although he also acts under one which is unlawful. Thus, in an action, brought by Edward J. Woolsey, against the tax receiver of a city and his deputy, for a trespass in levying upon the plaintiff's personal property, it appeared that the levy was made under eight tax warrants, issued against "E. J. Woolsey," which were regular upon their face; and the evidence showed presumptively that the plaintiff was the person intended

¹ *Shipman v Clark*, 4 Denio (N. Y.) 446, per Bronson, J., quoting *Hallett v Byrt*, Carthew, 380.

² *Billings v Thomas*, 114 Mass. 570; *Stimpson v Reynolds*, 14 Barb. (N. Y.) 506; *Otis v Williams*, 70 N. Y. 208. See also, *Willard v Kimball*, 10 Allen Mass. 211;

Foster v Pettibone, 20 Barb. (N. Y.) 350;

Bullis v Montgomery, 50 N. Y. 352.

³ *Stetson v Packer*, 7 Cush. (Mass.) 562.

⁴ *Woodward v Hopkins*, 2 Gray (Mass.) 210.

See also, *Bean v Crosby*, 1 Allen (Mass.) 220.

therein. It appeared also, that the plaintiff was the owner of land, on account of which the taxes specified in three of the warrants were levied, but he had paid the taxes on that land before the warrants were issued; and that the property, on account of the taxes upon which the other five warrants were issued, was owned by Emily P. Woolsey. The court held, that it could be proved by evidence *aliunde*; that the plaintiff was the person intended in the warrants; that although the three warrants for taxes that had been paid were unlawful, yet as the taxes for which the other five were issued had not been paid, the tax receiver was justified in issuing the warrants, and the deputy was justified in levying thereunder, although the assessment to the plaintiff was unlawful; that the officers did not lose their protection, because the seizure was also made under the unlawful warrants, in the absence of proof of malice, or abuse, or of special damages growing out of the levy under the unlawful warrants, separable from the damages growing out of the levy, under those which were lawful.¹

§ 768. **Protection of process; as to officer's assistants, volunteers, parties.**—Not only is the officer protected by process, but those whom he calls to his assistance in the execution thereof, are protected, to the same extent and under the same circumstances as the officer himself;² but it has been said, that the same protection does not extend to volunteers.³ And the party, who sues out process, which is, for any reason, unlawful, derives no protection therefrom, but is liable in the proper form of action, for the acts of the officer thereunder.⁴

¹ Woolsey v Morris, 96 N. Y. 311. Accord, on the proposition that one lawful warrant protects a collector, although he also levies under an unlawful warrant. Hays v Drake, 6 Gray (Mass.) 387.

² Goodwine v Stephens, 63 Ind. 112; Payne v Green, 18 Miss. 507;

Kilpatrick v Frost, 2 Grant (Pa.) 168; McMahan v Green, 34 Vt. 69.

³ Kirbie v State, 5 Tex. App. 60.

⁴ Shergold v Holloway, 2 Str. 1,002; Moravia v Sloper, Willes, 30; Earl v Camp, 16 Wend. (N. Y.) 502. See also, Tuttle v Wilson, 24 Ill. 553.

§ 769. **Officer's refusal to execute process issued without jurisdiction; ruling where he treats it as valid.**—Where the process was issued, without jurisdiction having been acquired, or is otherwise void as between the parties, although, being “fair upon its face” it will protect the officer; he is not bound to execute it, and an action will not lie against him for his refusal so to do.¹ But if the defect is capable of amendment, and the officer elects to execute the process, he is still protected by it, and cannot afterwards set up the defect.² And an officer, sued for money collected under a void process, cannot set up the invalidity in defence.³

§ 770. **Officer's protection is a shield, and not a sword.**—The officer's right to protection under his process is given to him by the law as a shield, and not as a sword; it does not confer upon him any power to maintain an action, in aid of the execution of process, which is intrinsically unlawful; but in such an action he must, as in other cases, rely upon the jurisdiction of the court or body issuing the process, and the regularity of the proceedings for that purpose; either by affirmative proof of the jurisdictional facts, and of compliance with the requisites of law; or by a resort to legal presumptions, which may be overcome by proof on the other side, as the case may require.⁴ Thus, in an action brought by a sheriff against a constable, where the constable levied upon goods of one K, under an execution issued upon a judgment by confession in a

¹ Tuttle v Wilson, 24 Ill. 553;
Housh v People, 75 Ill. 487;
Earl v Camp, 18 Wend. (N. Y.) 562;
Newburg v Munshower, 29 Ohio St.
617.
See also, Cornell v Barnes, 7 Hill
(N. Y.) 35;
Reid v Stegman, 99 N. Y. 646.
² Dunham v Reilly, 110 N. Y. 366, rev'g
47 Hun (N. Y.) 241.

³ Williamstown v Willis, 15 Gray
(Mass.) 427;
Cheever v Merritt, 5 Allen (Mass.) 563;
Sherman v Torrey, 99 Mass. 472.
⁴ Dunlap v Hunting, 2 Denio (N. Y.) 643,
per Bronson, J., p. 645;
Sheldon v Van Buskirk, 2 N. Y. 473;
Clearwater v Brill, 63 N. Y. 627, rev'g
4 Hun (N. Y.) 728.

justice's court, which was invalid, by reason of failure to comply with the statute; and the sheriff afterwards seized the goods under an attachment against K; whereupon the constable retook the goods; it was held, that if, at the time when the constable retook the goods, the sheriff was in full and complete possession of the same, the latter was liable for retaking them, because the constable "as an officer acting under process apparently valid, but void in law, can avail himself thereof for his defence, but not as a justification for affirmative and aggressive action;" and in this case it was clear, that the constable could not have maintained replevin for the goods, because the judgment, on which the execution was issued, was void against the creditors of K; and he could not do with his own hand, that which the law would render him no aid in accomplishing. ¹

IV. Other actions at law by or against public officers.

§ 771. **References to rulings cited elsewhere ; doctrine of scandalum magnatum.**—This subject, as far as it comes within the scope of this work, has already been so fully considered in former chapters, in its incidental connection with other subjects, that little more than references to the places, where the different rulings relating thereto may be found will be needed here. To commence with actions by public officers. We have already shown, that every public officer, although not expressly so authorized by statute, has implied authority to maintain any action requisite for the due discharge of his official duties, or, as the rule has been stated, that his capacity to sue is commensurate with his public trusts or duties.² And in most instances, actions by or against particular officers, as representatives of the public interests, or of particular public bodies, are thus regulated by

¹ *Bodine v Thurwachter*, 34 Hun (N. Y.) 6. ² *Ante*, § 544.

statutes, containing special provisions for the collection of any judgment, which may be rendered against the officer in such an action. So, as we have shown, an officer may maintain an action to recover his lawful compensation, against the municipality or other public body, liable to pay the same, subject to certain exceptions, which have been considered in detail.¹ So an officer *de jure*, having established his right to the office, may maintain an action to recover the emoluments of the office, against an intruder who has received the same.² The rules, relating to the validity of bargains for offices or for official conduct, and the consequent right to maintain actions thereupon, have also been fully considered.³ And the same consideration has been given to securities, taken upon the exercise of official power,⁴ and also upon the appointment of a deputy.⁵ The doctrine of *scandalum magnatum* has never been adopted in this country.⁶

§ 772. **The same subject.**—With respect to actions against public officers, it was shown in a former chapter, that a contract or other act, made or performed by a public officer, expressly or impliedly authorized by law to make or perform the same, binds the government of the state or nation, in like manner as a contract made by an individual, through his authorized agent, binds the individual; and that the constitutional prohibition against passing any law, impairing the obligation of contracts, applies to a contract thus made: and the same rule applies to a contract made, or other act performed, by an officer, in behalf of a municipality or other public body, with this additional feature, that in the former case the principal is

¹ *Ante*, §§ 510 to 519.

² *Ante*, §§ 521 to 523.

³ *Ante*, ch. 6.

⁴ *Ante*, ch. 28.

⁵ *Ante*, ch. 24.

⁶ *Sillars v Collier*, 151 Mass. 50.

See also, Townshend on Slander & Libel, 4th ed. § 138;

Hogg v Dorrah, 2 Port. (Ala.) 212;

Reeves v Winn, 97 N. C. 246.

not, and in the latter the principal is, liable to an action founded upon the contract or other act. And, in neither case, is the officer liable to such an action. But the rule is different, where the officer has exceeded his powers; and every person dealing with an officer is chargeable with notice of the extent of his powers; and this rule is more stringent, in the case of a contract or other act by a public officer, than in the case of a private agency. That the government is never estopped by the existence of an apparent, as distinguished from an actual authority; but a municipality or other public body may be, provided the act was within its own powers. And that, although a municipality or other public body is liable, subject to certain exceptions stated, for the acts of its officer, in the discharge of duties imposed by law upon the body itself, it is not liable where such duties are imposed by law upon the officer, as distinguished from the body for which he acts.¹

§ 773. **Personal liability of officer; analogy to doctrine of private agency.**—Many questions, upon some of which the authorities are conflicting, have arisen respecting the individual liability of a person acting as agent for another, depending upon the form of the contract entered into by him; an excess of his powers, or his want of power; representations and other acts of the agent, forming part of the transaction; and other circumstances, such as the intervention of the rights of third persons, and the like. In general, the rules of law relating to the individual liability of a public officer, in cases of this kind, are the same as those which govern the individual liability of a private agent in similar cases, and are considered in treatises upon the law of principal and agent, the law of contracts, and the law of bills of exchange and promissory notes. It is therefore not

¹ *Ante*, §§ 551, 593.

within the scope of this work, to consider such questions. But in this class of cases, some rules, specially relating to public officers, have been declared by the courts, which will now be briefly stated.

§ 774. **The same subject; presumption that officer binds the public.**—The legal presumption always is, that an officer, acting in behalf of the public, or of a municipality or other public body, binds his principal and not himself, and that the person dealing with him relies upon the responsibility of the principal, and not of the officer; unless the contrary intent is clearly apparent from the nature of the transaction, the words of the instrument, or the circumstances attending the transaction; and this, although in a similar case, where the agency was private, the agent himself would be personally liable, and although the contract was under seal.¹

¹ Story on Agency, 9th ed. § 302;
Macbeath v Haldimand, 1 T. R. (D. & E.) 172;

Bowen v Morris, 2 Taunt. 374, per Lord Mansfield, Ch. J., p. 387;

Twyecross v Dreyfus, L. R., 5 Ch. Div. 605; 46 L. J. Ch. 510; 36 L. T. 752;

Newman v Sylvester, 42 Ind. 106;

Brown v Austin, 1 Mass. 208;

Tippets v Walker, 4 Mass. 595;

Dawes v Jackson, 9 Mass. 490;

Savage v Gibbs, 4 Gray (Mass.) 601;

Cutler v Ashland, 121 Mass. 588.

Lyon v Irish, 58 Mich. 518;

Knight v Clark, 48 N. J. L. 22;

Walker v Swartwout, 12 Johns. (N. Y.) 444;

Bronson v Woolsey, 17 Johns. (N. Y.) 46;

Olney v Wickes, 18 Johns. (N. Y.) 122;

Fox v Drake, 8 Cow. (N. Y.) 191;

Belknap v Reinhart, 2 Wend. (N. Y.) 375;

Nichols v Moody, 22 Barb. (N. Y.) 611;

Heidelberg School Dist. v Horst, 62 Pa. St. 301;

Enloe v Hall, 1 Humph. (Tenn.) 303;

Brazelton v Colyar, 2 Baxt. (Tenn.) 234;

Miller v Ford, 4 Rich. L. (S. C.) 376;

Hodgson v Dexter, 1 Cranch (U. S.) 345.

Accord, Comer v Bankhead, 70 Ala. 493;

Cahokia School Trustees v Rautenberg, 88 Ill. 219;

Perrin v Lyman, 32 Ind. 16;

Wallis v Johnson Sch. Tp., 75 Ind. 368;

Bayliss v Pearson, 15 Iowa 279;

Wing v Glick, 56 Iowa 473;

Stinchfield v Little, 1 Me. 231;

Ross v Brown, 74 Me. 352;

Bainbridge v Downie, 6 Mass. 253;

Freeman v Otis, 9 Mass. 272;

Fowler v Atkinson, 6 Minn. 503;

McClenticks v Bryant, 1 Mo. 598;

Tutt v Hobbs, 17 Mo. 486;

Rathbon v Budlong, 15 Johns. (N. Y.) 1;

Osborne v Kerr, 12 Wend. (N. Y.) 179;

Jones v La Tombe, 3 Dall. (U. S.) 384;

McCurdy v Rogers, 21 Wis. 197.

§ 775. **References to rulings cited elsewhere.**—Numerous rulings, relating to the liability of a public officer to an action, either by the people, the public authorities, or an individual, will be found in the chapter relating to his official bond;¹ and the chapter relating to the liabilities of the sureties in an official bond.² With respect to the latter class of cases, those which hold that the sureties are not liable, because the time, when the officer's act or default was committed, was not a part of the time covered by the bond, or by reason of some defence peculiar to them in their character of sureties, are, of course, inapplicable upon the question, whether the officer himself is liable for the same act or default. An officer's liability for the acts of his deputies has also been considered at length.³ The same may be said of his liability for extortion;⁴ and to a penalty for refusing to accept an office for which he has been chosen.⁵ And the rule, that an officer *de facto* is liable for his acts or omissions, in the exercise of the office of which he holds possession, in like manner an officer *de jure*, has also been stated and illustrated.⁶

¹ *Ante*, ch. 11.

⁴ *Ante*, ch. 22.

² *Ante*, ch. 12.

⁵ *Ante*, ch. 10.

³ *Ante*, ch. 24.

⁶ *Ante*, ch. 27.

CHAPTER XXX

JUDICIAL PROCEEDINGS TO OUST A USURPER FROM AN OFFICE AND TO PUT THE RIGHTFUL OFFICER IN POSSESSION THEREOF, AND OF THE APPURTENANCES THERETO

CONTENTS

I. Information in the nature of a quo warranto; and other statutory proceedings to oust a usurper, and put the rightful officer in possession.

SEC. 776. The ancient prerogative writ of quo warranto, superseded by the information in the nature of a quo warranto; definitions of the latter.

777. Information granted in the same cases, and governed generally by the same rules, as the ancient writ; modified in several states, and superseded in others, but general rules are the same. In some states, a special statutory proceeding exists to contest an election; *qu.* whether this proceeding supersedes the information. An enactment, making a body the judge of the election, etc., of its members, does not oust the jurisdiction of the courts.

778. Not essential to the jurisdiction, that a person is to be put in possession; it suffices that a person holding office unlawfully is to be ousted.

779. Right to maintain the proceedings is inherent in the sovereignty from which the office proceeds; a state cannot maintain it, to oust a person from an office created by the United States.

780. The proceedings cannot be taken, where the relief can be obtained by some other proceeding.

781. A private relator must obtain leave of the court to file the information, and the granting or refusing of the application is discretionary; but the attorney-general has an absolute right to take the proceedings; what interest a private relator must have in the question to be decided.

782. Principles, which control the discretion of the court, in granting or refusing the application.

SEC. 783. The controversy must relate to a lawful and public office, as distinguished from an employment, etc.; but title to a petty office may be thus determined.

784. The person, against whom the proceedings run, must be in actual possession of the office.

785. Upon the trial, the burden of proof is upon the respondent to establish a good title; but a *prima facie* case shifts the burden. And the relator cannot recover possession, unless he establishes his title, although the respondent may be ousted.

786. Judgment of ouster must be rendered, although the usurpation has ceased before the trial. Where a fine may be imposed, it will not be substantial, if there was a fair question, etc. Rule as to the relator's damages, sustained by the usurpation.

II. Proceedings by an officer, to recover possession of the books, papers, and other appurtenances of his office.

787. Mandamus lies to compel an officer, whose term has expired, to deliver appurtenances of the office to his successor. Replevin also lies in a similar case.

788. In many states, a statutory proceeding lies for that purpose; general principles as to the right to maintain it.

789. The proceedings will not lie, unless the applicant has a clear *prima facie* title, and respondent withholds the books, etc., without color of title.

790. The right to the office is not determined in these proceedings, and the applicant must have obtained possession; if he is the actual incumbent, the validity of his appointment, etc., cannot be questioned.

791. Although title cannot be tried, the proceedings can be maintained, if the respondent's claim is frivolous.

792. The statute must be closely followed in the form of the proceedings; instance.

I. Information in the nature of a quo warranto; and other statutory proceedings, to oust a usurper and put the rightful officer in possession of an office.

§ 776. The ancient writ practically superseded by an information in the nature of a quo warranto.—The writ of quo warranto is an ancient prerogative writ, which

has been for many years practically superseded by the information in the nature of a quo warranto, by reason of the more convenient, effective, and speedy procedure, under the latter, and because the former was a writ of right, the final judgment upon which was conclusive against all the world, including the crown.¹ Of the latter, an eminent judge has said: "The information which has superseded the old writ, is defined to be a criminal method of prosecution, as well to punish the usurper by a fine for the usurpation of the franchise, as to oust him and seize it for the crown. It has, for a long time, been applied to the mere purpose of trying the civil right, seizing the franchise, or ousting the wrongful possessor, the fine being nominal only."² And a leading text writer has said: "The modern information in the nature of a quo warranto may be defined as an information, criminal in form, presented to a court of competent jurisdiction, by the public prosecutor, for the purpose of correcting the usurpation, misuser, or nonuser of a public office, or corporate franchise. The object of the information, as now employed both in the courts of England and America, is substantially the same as that of the ancient writ of quo warranto; and, though still retaining its criminal form, it has long since come to be regarded as in substance a civil proceeding, instituted by the public prosecutor, upon the relation of private citizens, for the determination of purely civil rights."³

§ 777. Wherein the information differs from the ancient writ.—The information is granted, in cases where the writ would have been formerly granted, and not other-

¹ 3 Blackst. Commentaries, 262, 263.

Rex v Shepherd, 4 T. R. (D. & E.) 381;
Rex v Stafferton, 1 Bulst. 55.

² People v Utica Ins. Comp'y, 15 Johns. (N. Y.) 358, per Spencer, J., p. 387; citing 2 Inst. 281, pl. 12;

³ High on Extr. Rem., § 591.

Rex v Marsden, 3 Burr. 1812, at p. 1,817;

See also, Osgood v Jones, 60 N. H. 543.

wise;¹ and usually the court is allowed by statute, to impose a substantial fine. In many of the states, the writ and the information have been abolished, and an action, brought by the attorney-general, upon his own information, or upon the relation of a private person, has been substituted in place thereof, accomplishing the same purpose, governed by substantially the same rules, and resulting, if successful, in substantially the same judgment. In other states, a special statutory remedy has been provided, for contesting the result of an election, by a notice and summary trial, at the instance of an elector, or of the prosecuting officer in behalf of the people. It has been held, that the summary statutory proceeding does not abolish the information in the nature of a quo warranto, but that both remedies are open to the contestant, or one may be pursued by him, and the other by the people;² but other cases hold, that the statutory proceeding supersedes the information, with respect to the right of the state, as well as that of a private person, to pursue the latter.³ A constitutional or a statutory provision, that a body shall determine respecting the election or qualification of its members, does not oust the jurisdiction of the courts to determine the same, upon an information in the nature of a quo warranto, or an equivalent statutory proceeding.⁴

§ 778. **May be confined to ouster only.**—We have no concern in this work, with that feature of the infor-

¹ *State v Paul*, 5 Stew. & P. (Ala.) 40;
Lindsey v Att'y Gen'l, 23 Miss. 508;
Comm. v Murray, 11 Serg. & R. (Pa.) 73.

² *People v Holden*, 28 Cal. 123;
State v Gallagher, 81 Ind. 558.
 See also, *Talkington v Turner*, 71 Ill.
 234;
Clark v Robinson, 88 Ill. 498;
Tarbox v Sughrue, 36 Kan. 225;
Conger v Convery, 52 N. J. L. 417.

For other rulings, relating to a statutory contest, see *Clanton v Ryan*, 14 Colo. 419;

Greenwood v Murphy, 131 Ill. 604;
Cusick's Election, 136 Pa. St. 459.

³ *State v Marlow*, 15 Ohio St. 114;
Comm. v Garrigues, 28 Pa. St. 9;
Comm. v Henszey, 81* Pa. St. 101.

⁴ *Ante*, §§ 397, 429.

mation, which relates to the forfeiture of a corporate franchise, or the prevention of the unauthorized exercise of corporate power. Our business relates merely to the proceedings to oust a usurper from a public office, exercised by him. And it is to be noted, that it is not at all essential to the jurisdiction to grant and enforce the information, that it should also aim to put into possession of the office, a person rightfully entitled thereto. Where it is prosecuted by the attorney-general, or other public prosecutor, it lies for setting up a new office without authority of law;¹ or where an officer is acting without having taken the official oath or given the official bond required by law;² or where the statute, under which he holds, is alleged to be unconstitutional;³ or where the incumbent has forfeited his office, as by the acceptance of another incompatible office;⁴ or where his election was procured by bribery;⁵ or where, after accepting his office, he has virtually abandoned it;⁶ or in any other case, where the person, against whom it is brought, holds the office without authority of law, whether his original holding thereof was lawful or unlawful, and whether any other person is or is not entitled to the same.⁷ But where the governor has the power to remove a public officer, upon

¹ *Rex v Boyles*, 2 Stra. 836.

² *In re Mayor of Penryn*, 1 Stra. 582.

See also, *ante*, §§ 173-175, 629.

³ *Att'y Gen'l v Holihan*, 29 Mich. 116.

See also, *Dullam v Willson*, 53 Mich. 392.

⁴ *Ante*, ch. 4.

⁵ *State v Collier*, 72 Mo. 13;

Comm. v Walter, 83 Pa. St. 105.

⁶ *State v Graham*, 13 Kan. 136.

⁷ *People v Bingham*, 82 Cal. 238;

Osgood v Jones, 60 N. H. 543;

People v Sweeting, 2 Johns. (N. Y.) 184;

Hyde v State, 52 Miss. 665.

See also, *State v Hixon*, 27 Ark. 398;

Davidson v State, 20 Fla. 784;

Stone v Wetmore, 44 Ga. 495;

Collins v Huff, 63 Ga. 207;

People v Callaghan, 33 Ill. 128;

Gass v State, 34 Ind. 425;

Griebel v State, 111 Ind. 369;

Tarbox v Sughrue, 36 Kan. 225;

State v Co. Com'rs, 39 Kan. 85;

Neeland v State, 39 Kan. 154;

Att'y Gen'l v Megin, 63 N. H. 378;

Prince v Boston, 148 Mass. 285;

Farrington v Turner, 53 Mich. 27;

State v Stein, 13 Nebr. 529;

Hammer v State, 44 N. J. L. 667;

State v Meehan, 45 N. J. L. 189;

Comm. v Small, 26 Pa. St. 31;

State v Schnierle, 5 Rich. L. (S. C.) 299;

Williams v State, 69 Tex. 368.

charges and notice thereof, his act is final, and cannot be reviewed by an information in the nature of a quo warranto, against the person appointed in place of the officer so removed.¹

§ 779. **A state cannot oust from office created by the United States.**—The right to inquire into the authority, by which a person assumes to exercise the functions of an office, and to remove him, if he is a usurper, is inherent in the people in their sovereign capacity;² and the proceedings must be taken in the name of the sovereign power, from which the power of the office proceeds. Thus an action, in the nature of a quo warranto, does not lie in a state court, and in the name of the state, to determine the title to the office of elector of president and vice president of the United States, since the office originates in the United States constitution, although the office is filled under the power of the state.³

§ 780. **Depends upon the existence of no other adequate remedy.**—A writ of quo warranto would not formerly lie, and the information or other remedy in lieu thereof will not now lie, in a case where the relief can be obtained by mandamus;⁴ or, as a general rule, by any other remedy.⁵

§ 781. **The doctrine touching leave to file the information.**—The statute, 9 Anne, ch. 20, requires a private relator to obtain the leave of the court, before filing an

¹ *State v Hawkins*, 44 Ohio St. 98.

² *People v Holden*, 28 Cala. 123.

³ *State v Bowen*, 8 S. C. 400.

See also, *Territory v Lockwood*, 3 Wall. (U. S.) 236; and *De Turk v Comm.*, 129 Pa. St. 151, cited *ante*, § 31, note 4.

⁴ *Reg. v Hungerford*, 11 Mod. 142;

State v Lewis, 10 Ohio St. 123.

For the rules respecting the cases where mandamus will not lie, to set-

tle disputed questions of title, see *post*, § 825.

⁵ *Lord Bruce's Case*, 2 Stra. 819;

Rex v Heaven, 2 T. R. (D. & E.) 772;

State v Wilson, 30 Kan. 661;

People v Every, 38 Mich. 405;

State v Marlow, 15 Ohio St. 114;

Comm. v Leech, 44 Pa. St. 332;

State v Wadkins, 1 Rich. L. (S. C.) 42.

See also. *People v Hillsdale*, etc., *Turnpike Comp'y*, 2 Johns. (N. Y.) 190.

information in the nature of a quo warranto; and a similar provision is contained in the statutes of each of the states, where that remedy is allowed, and in those of most of the states, where an action or special statutory proceeding has been substituted therefor. Granting or refusing an application for that purpose rests in the sound discretion of the court, even where the papers, presented upon the application, show that the title of the person, against whom the proceeding is to be taken, is substantially defective.¹ But where the proceedings are taken by the attorney-general, the court, unless the statute otherwise expressly provides, has no discretion, but is bound to grant the application, if it is necessary for him to make one.² Where the application is made by a private person, he must show that he has some interest in the question to be decided; but it has been held, that the interest which one, who is a citizen and a tax payer, has in the due administration of public affairs, will entitle him to maintain the proceeding, if its object is merely to oust a person unlawfully holding a public office.³ But where the object of the proceeding is also to put the

¹ Anon. 1 Barn. K. B. 279;
 Rex v Marten, 4 Burr. 2,122;
 Rex v Peacock, 4 T. R. (D. & E.) 684.
 Rex v Parry, 6 Ad. & E. 810;
 Rex v Trevenen, 2 B. & Ald. 479;
 Reg. v Cousins, 42 L. J., Q. B., 124; 28
 L. T. 116;
 People v Keeling, 4 Colo. 129;
 Stone v Wetmore, 44 Ga. 495
 Dorsey v Ansley, 72 Ga. 460;
 People v Waite, 70 Ill. 25;
 People v Moore, 73 Ill. 132;
 People v Callaghan, 83 Ill. 128.
 State v Tolan, 33 N. J. L. 195;
 Comm. v Reigart, 14 S. & R. (Pa.) 216;
 Comm. v Arrison, 15 S. & R. (Pa.) 127;
 Comm. v Jones, 12 Pa. St. 365;
 Comm. v Cluley, 56 Pa. St. 270;
 State v Brown, 5 R. I. 1;

State v Schnierle, 5 Rich. L. (S. C.) 299;
 State v Fisher, 28 Vt. 714;
 State v Smith, 48 Vt. 266;
 State v Mead, 56 Vt. 353.

² Comm. v Allen, 128 Mass. 308.
 People v Knight, 13 Mich. 230.
 See also, Comm. v Walter, 83 Pa. St.
 105.
 Contra, People v Sweeting, 2 Johns.
 (N. Y.) 184;

³ People v Londoner, 13 Colo. 303;
 Churchill v Walker, 68 Ga. 681;
 Comm. v Meeser, 44 Pa. St. 341.
 Accord, State v Martin, 46 Conn. 479;
 State v Vail, 53 Mo. 97;
 State v Hammer, 42 N. J. L. 435;
 Comm. v Co. Com'rs, 1 S. & R. (Pa.)
 382.

relator into possession of the office, he must show affirmatively, upon his application, that he has, at least *prima facie*, the better title.¹ But if the applicant has been kept out by the respondent, it is not necessary for him to show that he has qualified.² A private person cannot maintain an information, to oust a person from an office of a body acting as a municipal corporation, on the ground that the body has no legal existence as a corporation; the attorney-general only can maintain an information in such a case.³

§ 782. **The same subject.**—Where the application is made by a private relator, the court will not, in general, grant it, if the matter is of little importance, or the term of the office has so nearly expired, that but little practical benefit will result from the proceeding.⁴ So, the court refused to grant a rule, applied for by the former occupant of an office, on the ground that his dismissal from office had been illegal, where it was satisfied that if he should be reinstated, he might legally, and would be, dismissed again immediately;⁵ and, in one case, the same ruling was made, upon an application by the attorney-general.⁶ And the conduct of the relator, such as his acquiescence, delay, etc., and all the other circumstances

¹ *Collins v Huff*, 63 Ga. 207;
Hardin v Colquitt, 63 Ga. 588;
State v Tipton, 100 Ind. 73;
Jones v State, 112 Ind. 193;
State v Boal, 46 Mo. 528;
People v Ryder, 12 N. Y. 433.

² *Ante*, §§ 164, 172. So where the proper officer refused to approve his bond.
Ante, § 175.

³ *State v Vickers*, 51 N. J. L. 180.
 See also, *People v Gunn*, 85 Cal. 238.

⁴ *Anon.* 1 Barn. K. B. 279;
State v Centreville Bridge Comp'y, 18 Ala. 678;
Comm. v Reigart, 14 S. & R. (Pa.) 216;

Comm. v Jones, 12 Pa. St. 365;
State v Fisher, 28 Vt. 714.

⁵ *Ex parte Richards*, 3 L. R., Q. B. Div. 368; 47 L. J., Q. B. 498; 38 L. T. 684; 26 W. R. 695.

So the proceedings will be dismissed, if the term of the office or the relator's title has expired, or nearly expired, at the time of the trial.

State v Tudor, 5 Day (Conn.) 329;
State v Porter, 58 Iowa 19;
State v Jacobs, 17 Ohio 143;
State v Ward, 17 Ohio St. 543, at p. 548;
Att'y-Gen'l v Megin, 63 N. H. 378.

⁶ *People v Sweeting*, 2 Johns. (N. Y.) 184;

bearing upon the question, will be considered, in determining whether the application shall be granted or refused.¹

§ 783. **Controversy must relate to an office, as distinguished from a mere employment.**—In order to enable the court to grant the application, it must appear, that the controversy relates to the title of a lawful and public office, as distinguished from an employment, a contract, or other situation, not embraced within that term.² Thus, an information in the nature of a quo warranto cannot be sustained against a pilot, for he is not a public officer, his license being only granted for the protection of commerce.³ But petty officers, appointed by magistrates, or the like, may be ousted by these proceedings;⁴ although, as already stated, the court inclines not to grant the application in such a case.

§ 784. **The alleged usurper must have actual possession.**—In order to sustain the information, it is necessary that the person, against whom it runs, should be in the actual possession and user of the office; a mere claim to it will not suffice.⁵ But it seems, that taking the oath of office suffices for that purpose, although he has not

¹ *Rex v Dawes*, 4 Burr. 2,120;
Rex v Peacock, 4 T. R. (D. & E.) 684;
Rex v Marten, 4 Burr. 2,122;
Reg. v Lockhouse, 14 L. T., N. S. 359
Rex v Parry, 6 Ad. & E. 810;
People v Keeling, 4 Colo. 129;
People v Waite, 70 Ill. 25;
People v Moore, 73 Ill. 132;
People v Callaghan, 83 Ill. 128
Dorsey v Ansley, 72 Ga. 460;
State v Tipton, 109 Ind. 73;
People v Harshaw, 60 Mich. 200;
Att'y Gen'l v Megin, 63 N. H. 378;
State v Tolan, 33 N. J. L. 195;
State v Schnierle, 5 Rich. L. (S. C.) 299.

² *State v North*, 42 Conn. 79;
Eliason v Coleman, 86 N. C. 235.

See also, *Comm. v Dearborn*, 15 Mass. 125;

People v DeMill, 15 Mich. 164;
People v Hills, 1 Lans. (N. Y.) 202. As to what are public offices, within this rule, see *ante*, ch. 1.

³ *Dean v Healy*, 66 Ga. 503.

⁴ *Darley v Reg.*, 12 Cl. & Finn. 520.
Accord, *Rex v Bedford Level*, 6 East 356;
Rex v Justices of Herefordshire, 1 Chitt. 700;
Reg. v Hampton, 6 B. & S. 923; 13 L. T. 431; 12 Jur. N. S. 583; 15 W. R. 43;
Reg. v Poor Guardians, 17 Q. B. (Ad. & Ell., N. S.) 149.

⁵ *Rex v Whitwell*, 5 T. R. (D. & E.) 85.

actually performed any of the duties of the office.¹ And where a person has taken the oath of office, and otherwise entered into possession of the office to which he was chosen, and afterwards abandons it, an information to oust him will lie.²

§ 785. **Doctrine as to the burden of proof.**—According to the weight of the authorities, upon the trial of an information in the nature of a quo warranto, the prosecutor is not required, in the first instance, to show want of title in the person, against whom the information is exhibited; nor, it seems, if the proceeding is brought by a private relator, to show title in himself; but the burden is upon the respondent to establish a good title; and for that purpose, it may not be enough for him to show an original good title; he must establish the continued existence of every qualification, necessary to the continued holding of the office, if any such qualifications exist.³ But where the respondent has shown a good *prima facie* title, such as a regular certificate of election by the canvassers, or a commission or certificate of appointment by the proper authority, the burden of proof is shifted to the prosecutor.⁴ And although the respondent's title may be defective, the relator cannot recover possession, unless he shows a clear title in himself. If he fails

¹ *Rex v Harwood*, 2 East 177;
Rex v Tate, 4 East 337;
People v Callaghan, 83 Ill. 128.
 See also, *State v Atlantic City*, 52
 N. J. L. 332.

² *State v Graham*, 13 Kans. 136.

³ *Rex v Leigh*, 4 Burr. 2,143;
State v Gleason, 12 Fla. 190;
People v Mayworm, 5 Mich. 146;
State v McCann, 88 Mo. 386;
People v Thompson, 21 Wend. (N. Y.)
 235;
People v Pease, 27 N. Y. 45, aff'g 30
 Barb. (N. Y.) 588;
People v Thacher, 55 N. Y. 525.

See also, *People v Miles*, 2 Mich. 348;
Clark v People, 15 Ill. 213;
State v Beecher, 15 Ohio 723;
People v Clayton, 4 Utah 421;
People v Jack, 4 Utah 438.
Contra, semble, State v Hunton, 28 Vt.
 594;

⁴ *State v Buckland*, 23 Kan. 259;
Att'y Gen'l v Megin, 63 N. H. 378;
People v Pease, 27 N. Y. 45;
People v Thacher, 55 N. Y. 525.

That a certificate or commission is only
prima facie evidence of title, and
 the actual facts may be shown upon
 quo warranto, see *ante*, §§ 297-299.

so to show title, the judgment will merely oust the respondent, leaving the prosecutor to recover possession in some other form of proceeding, if he shall be able so to do.¹

§ 786. **Nature and extent of judgment, and measure of damages.**—Judgment of ouster ought to be rendered, if the respondent's title appears to have been defective, although his usurpation has not been continued until the trial.² Where the statute allows the imposition of a fine, the amount thereof, within the statutory limit, rests in the discretion of the court; but a substantial fine will not usually be imposed, where the question of title to the office was fairly open to doubt, and there was nothing specially censurable in the respondent's conduct.³ In some of the states, the court is allowed, by statute, to give to the relator the damages which he has sustained by the usurpation. But unless the statute so provides, he can recover such damages only in a separate action. The rules of law, relating to the amount of such damages, and the liability of the usurper therefor, have been considered in a former chapter.⁴

¹ *People v Knight*, 13 Mich. 230;
People v Connor, 13 Mich. 238;
People v Molitor, 23 Mich. 341;
Miller v English, 21 N. J. L. 317;
People v Bartlett, 6 Wend. (N. Y.) 422;
People v Loomis, 8 Wend. (N. Y.) 396;
People v Phillips, 1 Denio (N. Y.) 388;
People v Lacoste, 37 N. Y. 192;
People v Thacher, 55 N. Y. 525;
State v Norton, 46 Wis. 332.
 See also, *McGee v State*, 103 Ind. 444;
State v Bieler, 87 Ind. 320.

² *Hammer v State*, 44 N. J. L. 667.
 See also, *People v Loomis*, 8 Wend.
 (N. Y.) 396;
State v Pierce, 35 Wis. 93.

It has been held, however, that a state officer, against whom an information has been brought, on the ground that he holds also an office under the United States Government, can prevent a judgment of ouster, by resigning the latter office, before answering, and setting up the resignation in his answer. *De Turk v Comm.*, 129 Pa. St. 151.

³ *State v Brown*, 5 R. I. 1.

⁴ *Ante*, §§ 521-523. Numerous rulings in proceedings of this character will be found in ch. 9, *ante*.

See also, *ante*, §§ 94, 171-174, 333, 429, 438, 439, 513, 522.

II. Proceedings by an officer to recover possession of the books, papers, and other appurtenances of his office.

§ 787. When mandamus or replevin lies for this purpose.—Mandamus lies against an officer, whose term of office has expired, to compel him to deliver to his successor, the books, papers, and other appurtenances of the office; but only where there is no real contest respecting the title to the office, the rule in that respect being the same, as in cases of mandamus to put a party in possession of his office, which will be considered in the next succeeding chapter.¹ But a mere pretence of holding over, without color of right, will not defeat the remedy.² And where the applicant has recovered a judgment, establishing his title to the office, he is entitled to the relief by mandamus. And although the general rule is, that replevin will not lie against a public officer, for books or papers deposited in his office, as part of the public records, where the action is brought by a private person claiming title, but the only remedy is by mandamus;³ yet replevin will lie, in favor of a public officer, against one claiming to have been appointed his successor, for the manuscript and printed books, seals, revenue stamps, and other appurtenances of the office, of which the defendant has obtained possession.⁴ But the title to the office cannot be tried, in replevin for the property belonging to the office.⁵

¹ *People v Head*, 25 Ill. 325;
McGee v State, 103 Ind. 444;
Huffman v Mills, 39 Kan. 577;
Stone v Small, 54 Vt. 498.
 See also, *Delahanty v Warner*, 75 Ill.
 185;
American R'way Frog Comp'y v
Haven, 101 Mass. 398;
State v Meeker, 19 Nebr. 444;
Kimball v Lamprey, 19 N. H. 215;
Runion v Latimer, 6 S. C. 126.

See also, *ante*, § 644.

² *People v Kilduff*, 15 Ill. 492.

³ *People v State Treasurer*, 24 Mich. 468;
Brent v Hagner, 5 Cranch C. C. (U. S.)
 71.

See also, *Marbury v Madison*, 1 Cranch
 (U. S.) 137.

⁴ *Phenix v Clark*, 2 Mich. 327;
Flentge v Priest, 53 Mo. 540.

⁵ *Hallgren v Campbell*, 82 Mich. 255.

§ 788. **Special statutory proceeding; general principles.**—In many of the states, a special remedy has been created and regulated by statute, to enable the incumbent of an office to procure from his predecessor, or any other person having custody thereof, any of the books, papers, or other articles appurtenant to the office. The general purport of the different statutes, regulating these proceedings, is the same, although they vary in some matters of detail. A question has been raised, in New York, whether the statute of that state, relating to this remedy, applies to any officers, other than those deriving their authority directly from the statute law of the state, and, therefore, whether the remedy may be pursued by a municipal officer, especially one whose office was created by an ordinance of the municipality.¹ It has been held, that a town clerk may pursue the remedy.² Under the statute of Alabama, it has been held, that where the petitioner has been declared to be entitled to the office, after a contest, which has lasted so long, that his term of office will expire before the petition can be heard, and the person, against whom the process is prayed for, has been elected to the same office for the succeeding term, the petition will be denied.³

§ 789. **Applicant must have clear prima facie title, etc.**—The process will not be granted, unless the applicant's title to the office is clear.⁴ But a *prima facie* title suffices in the first instance, that is, to give jurisdiction.⁵ And the proceedings can be maintained, only where the conduct of the defendant, in refusing to

¹ *Bridgman v Hall*, 16 Abb. N. C. (N. Y.) 272; citing *North v Cary*, 4 T. & C. (N. Y.) 357; *People v Allen*, 51 How. Pr. (N. Y.) 97; *People v Allen*, 42 Barb. (N. Y.) 203. See also, *Conover's Case*, 5 Abb. Pr. (N. Y.) 73.

² *In re Bagley*, 27 How. Pr. (N. Y.) 151.

³ *Beebe v Robinson*, 64 Ala. 171.

⁴ *In re Hodgkinson*, 5 Hill (N. Y.) 631, note; *Conover's Case*, 5 Abb. Pr. (N. Y.) 73; *In re Devlin*, 5 Abb. Pr. (N. Y.) 281; *In re Whiting*, 2 Barb. (N. Y.) 513.

⁵ *In re Baker*, 11 How. Pr. (N. Y.) 418.

deliver over the books and papers, is wilful and without apparent justification, not where he holds possession of them in good faith, believing himself to be entitled to hold them.¹

§ 790. **How far title to the office may be investigated.**—The statutory proceeding is summary; it does not determine the right to the office, which can be done only by information in the nature of a quo warranto, but merely whether the applicant has been declared to be elected or appointed by the proper authority;² and the proceedings cannot be maintained, where there is any real controversy as to the title to the office, and the applicant has not obtained possession thereof.³ Where neither party has legal evidence of his election or appointment, the court has no power to inquire into the election, and ascertain and determine the result; but the remedy is by action to test the title to the office.⁴ But the application should not be denied, where the applicant clearly establishes an apparent legal right, because the validity of his appointment is involved.⁵ Nor will the fact, that the applicant's official bond is defective, defeat the application, inasmuch as the actual incumbent of the office is entitled to the remedy, and the defect does not affect his incumbency, but only his right to hold the office.⁶

§ 791. **But frivolous claim will not defeat application.**—Although the title to the office cannot be tried in this proceeding, still it is the duty of the court to examine into the nature of the claims of the respective

¹ *Bridgman v Hall*, 16 Abb. N. C. (N. Y.) 272.

² *Curran v Norris*, 58 Mich. 512.

³ *In re Davis*, 19 How. Pr. (N. Y.) 323;
Conover's Case, 5 Abb. Pr. (N. Y.) 73;
In re Devlin, 5 Abb. Pr. (N. Y.) 281.

⁴ *Case v Campbell*, 16 Abb. N. C. (N. Y.)

269; citing *People v Stevens*, 5 Hill (N. Y.) 616;

In re Baker, 11 How. Pr. (N. Y.) 418;
In re Davis, 19 How. Pr. (N. Y.) 323.

⁵ *In re Bagley*, 27 How. Pr. (N. Y.) 151;
People v Allen, 42 Barb. (N. Y.) 203.

⁶ *Hull v Super. Court*, 63 Cal. 174.

parties, and the facts relating thereto, sufficiently to enable it to be ascertained whether the person claiming the office, and the delivery of the books and papers, shows a clear right to the same, and whether the person with holding them has a reasonable color of right to do so. The legislature did not intend, that this remedy should be defeated, and the officer deprived of the muniments of his office, because some other person claims them, upon grounds which are frivolous, or create no reasonable doubt as to the applicant's right.¹

§ 792. **Statutory directions must be closely followed.**—This being a strictly statutory proceeding, the statute must be closely followed. In New York, where the statute provides that the responsive affidavit shall be taken by the judge who grants the order, the judge properly refused to admit the same, where the affidavit presented to him as taken by another officer.²

¹ *North v Cary*, 4 T. & C. (N. Y.) 357.

159; 8 N. Y. Supp. 677.

Accord, *People v Allen*, 51 How. Pr. (N. Y.) 97;

People v Barrett, 29 N. Y. St. Rep'r,

² *McGrory v Henderson*, 43 Hun (N. Y.) 438.

CHAPTER XXXI

JUDICIAL PROCEEDINGS TO REVIEW, COMPEL, OR
RESTRAIN OFFICIAL ACTION

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796. Conflict of authorities, whether the courts have, in any case, jurisdiction to control the action of the governor of a state.
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811. It lies only for errors of law; what questions may be reviewed on certiorari.

III. *Mandamus.*

812. *Mandamus* was originally a prerogative writ, but, in this country, it is an original common law writ, whereby a civil action is commenced; and power to grant it is not conferred by a grant of equity or appellate jurisdiction.
813. *Mandamus* and its office defined.
814. It will not lie, to enforce legislative action, or political duties; when it lies against legislative officers; its usual function is to compel performance of ministerial duties; but it will lie in certain cases against judicial officers; instances where it will or will not lie against judges and other judicial officers.
815. It can issue only by special direction of the court, and is granted or refused in the discretion of the court, subject, however, to legal rules, and to review; it will not be

- granted, where great laches have occurred; or where it will work hardship, etc.; or the right or duty is doubtful.
- SEC. 816. A private person applying for it must show a special interest; but some cases hold, that any citizen may have it, in a matter of public concern; other cases, *contra*.
817. It is granted of course to the attorney-general, in a matter of public concern; but not where private interests only are involved.
818. It will not lie, where the party may have another adequate remedy; but, in a matter of public concern, it will be granted, although an action at law lies.
819. The other remedy must be competent to afford the party full relief; if this is doubtful, *mandamus* lies. Liability to indictment does not prevent a *mandamus*.
820. It will lie, to enforce judicial or *quasi* judicial action, only where the officer, etc., refuses to act; but not to compel action in a particular way; still less to reverse action already taken, except where the decision has been reversed.
821. But where the act is ministerial, *mandamus* will direct its performance, and specify the mode of performance.
822. It will not lie, to control the action of an officer or body, in whom a discretion is vested by law. .
823. It will not lie to compel performance of an act, which cannot lawfully be performed; or where the officer has been enjoined, or has no power to act; case where it was denied, because the officer's time and attention were fully occupied with judicial duties.
824. It will not lie, to compel a financial officer to pay a demand, where no appropriation for the same has been made, or a lawful warrant, etc., has not been made.
825. It will not lie, to determine, directly or indirectly, a dispute respecting the title to an office; in such a case, the remedy is by information in the nature of a *quo warranto*; cases.
826. So it will not lie, in favor of a claimant, for the salary of the office, or to obtain recognition as a member of a board.
827. But some cases hold otherwise on this question.
828. Where there is no other claimant, *mandamus* lies, to reinstate an officer unlawfully suspended, or to induct a person into office; it lies to put into possession one who

has recovered judgment for the office, and in favor of the incumbent against a claimant, wrongfully obtaining the official papers.

SEC. 829. Other rulings are found in works devoted specially to this subject; a few cases, presenting special features, will be added.

830. Instances where mandamus was allowed in tax cases.

831. It lies against a tribunal, erroneously deciding that it has no jurisdiction; and in favor of a school teacher, to compel the proper officers to make and certify the pay roll.

832. An application for a mandamus against a city officer will not be denied, because "there are thousands of such cases," which "would require an army of workmen," etc.

833. It will not lie, to compel performance of a private right, or of a contract; or to compel a recording officer to cancel a conveyance, where the right is disputed; or to compel a city officer to obey the order of the aldermen.

834. It lies only against a court or an officer, not against an executor; and against a principal officer, not his deputy. When directed to a municipal officer, to compel performance of a continuing municipal duty, it runs against the municipality, and does not abate by the cessation of the officer's term. When issued in favor of a state, against the governor of another state, it runs in effect against the latter state, and the U. S. supreme court has jurisdiction to grant it.

IV. *Prohibition.*

835. Office and function of the writ of prohibition.

836. Writ issues upon special application, and is granted or refused in the sound discretion of the court; the applicant must have objected to proceedings below.

837. Want of jurisdiction is the foundation of the writ; its office is not to set aside or correct an erroneous judgment, where the inferior tribunal has jurisdiction; whether it lies in any case, where a final decision has been rendered below.

838. Whether it lies, where there is another remedy.

839. It will issue to a court, or an officer exercising *quasi* judicial functions; but it will not lie, to prevent the exercise of ministerial, executive, or administrative power; or to prevent the usurpation of an office.

- SEC. 840. It lies, to prevent action under an unconstitutional statute, or under a void judgment or order.

V. Injunction.

841. Injunction is either a writ or an order, in either case governed by the same rules; here we shall only consider injunctions against public officers.
842. Rules, governing the granting of an injunction against a public officer.
843. It will not lie, to restrain administrative or political officers, from the discharge of their ordinary official functions, or a judge from acting in a cause before him; or to restrain criminal proceedings; or mandamus; or prohibition.
844. It will not lie against a municipality, to prevent the passage of an ordinance, within the scope of its authority; but it will lie, if the ordinance is without such scope, where irreparable injury to the plaintiff will result, unless the ordinance would be void.
845. When police authorities may, and when they may not, be restrained from entering a club house.
846. Generally, it lies, to prevent public officers from acting without lawful authority, to the plaintiff's prejudice; instances.
847. When irreparable injury to the plaintiff must be shown.
848. It will not lie, where the plaintiff has another adequate remedy; instances.
849. It will not lie, to control, etc., discretionary power; exceptions to this rule.
850. It will not lie to oust a usurper from an office, and put the rightful officer in possession; or in aid of proceedings at law for that purpose; or, under the tax payers' statute, to prevent the payment of the salaries, etc., of officers, who are charged with being usurpers.
851. In many states, statutes have been enacted, allowing a tax payer to prevent, by suit and by injunction, misappropriation, etc., of public funds or property; whether such a suit can be maintained, without a statute; authorities on the negative side.
852. Authorities on the affirmative side.
853. Miscellaneous rulings in New York, under the statute of that state allowing a tax payer to maintain such an action.

I. Whether any public officers are exempt from the judicial supervision, considered in this chapter

§ 793. **What officers are exempt from judicial supervision.**—It goes without saying, that a judicial officer cannot be subjected to judicial supervision, by any other judicial officer, except his superior; so that the judges of the highest courts are necessarily exempt from such supervision; and a very obvious principle of public policy exempts members of the state and national legislatures from judicial supervision in the performance of their legislative duties. The rule has been extended, so as to include members of inferior bodies, possessing powers of municipal and other local legislation, where they are acting within their legislative powers.¹ But a grave question, upon which the adjudications are greatly in conflict, arises upon the powers of the courts to review, control, or prevent the action of the principal political or executive officers of the nation and the different states. A question, closely allied to this, and depending in part upon the same principles, namely, whether an action will lie in favor of a private person against either of such officers for official malfeasance, misfeasance, or nonfeasance, was considered in a former chapter.²

§ 794. **Exemption of the president.**—Upon the question now under consideration, as upon the question of liability to a private action, it may be said, that the official powers and functions of the president of the United States are of such a character, that it is difficult to conceive a case, where a court would have jurisdiction to grant either of the remedies, treated of in this chapter, to control his official action, consistently with the general principles, upon which the jurisdiction depends in every case: and in fact, the author is not aware of any case,

¹ See *post*, §§ 802, 814.

² *Ante*, §§ 711, 712.

wherein the question has been directly presented for adjudication.¹ In one case, the supreme court of the United States disclaimed the power to control the president, because, "as far as his powers are derived from the constitution, he is beyond the reach of any other department, except in the mode prescribed by the constitution, through the impeaching power;" but the remark was *obiter*, for the court was considering merely its power over the postmaster-general.² And in another case, the same court refused to restrain the president by injunction, from carrying into effect an act of congress, which, it was insisted, was unconstitutional, on the ground that his duties under the act were not ministerial, but purely executive and political, and resting in his own discretion; but it declined to decide, whether it had power to compel the president to perform or refrain from performing a ministerial act.³

§ 795. **Exemption of governor of a state.**—With respect to the power of the courts to control the action of the governor of a state, many cases have arisen thereupon. It is entirely clear, that the executive of a state is not subject to control from the courts, with respect to the exercise of his political powers, or his powers in any other matter, where his action is left to be guided by his own judgment and discretion. Thus, a mandamus will not issue to compel him to call an election;⁴ or to make and file a certificate, approving a valuation of property to be taken for public use, where the statute gives him discretion to approve or disapprove the same;⁵ or to certify that a public work has been performed

¹ *Ante*, § 712.

See also, *Marbury v Madison*, 1 Cranch (U. S.) 137.

² *Kendall v United States*, 12 Pet. (U. S.) 524, per Thompson, J., p. 610.

⁴ *People v Cullom*, 100 Ill. 472.

³ *Mississippi v Johnson*, 4 Wall. (U. S.) 475, per Chase, Ch. J., pp. 498, 499.

⁵ *Berryman v Perkins*, 55 Cal. 483.

according to contract;¹ or to issue state bonds, pursuant to a statute;² or, as commander in chief, to convene a court martial;³ or otherwise to perform or refrain from performing any executive function.⁴ Upon the question, whether the governor can be compelled by the courts to issue a commission, and, where that is requisite, to administer the oath of office, to an officer who has been duly elected, and concerning whose right to the office there is no pending controversy, the cases are directly in conflict; some holding that a bill in equity and an injunction will not lie, in favor of the successful candidate at an election, against the governor and the plaintiff's competitor, to compel the governor to issue a certificate of election to the plaintiff;⁵ and that a mandamus will not lie, to compel him to issue a commission to an officer, who has been duly chosen;⁶ while others hold that he may be compelled to do so by mandamus.⁷

§ 796. **The same subject; conflict of authorities.**—And the conflict of authorities upon this question extends, beyond particular instances of the exercise of the functions of the governor; for, in many adjudications, it has been held, that the courts have no jurisdiction to compel or restrain the official action of the governor of a state, in any case, even where the function to be exercised is of a purely ministerial character; some putting this ruling upon the ground of the necessity of preserving the

¹ *People v Governor*, 29 Mich. 320.

² *Jonesboro, etc., Turnpike Comp'y v Brown*, 8 Baxter (Tenn.) 490.
See also, *People v Bissell*, 19 Ill. 229.

³ *Mauran v Smith*, 8 R. I. 192.

⁴ *Hartranft's Appeal*, 85 Pa. St. 433.
See also, *Martin v Ingham*, 38 Kan. 641;
Miles v Bradford, 22 Md. 170;
State v Champlier, 2 Bailey L. (S. C.) 220;

Houston, etc., Comp'y v Randolph, 24 Tex. 317.

⁵ *Bates v Taylor*, 87 Tenn. 319.

⁶ *Hawkins v Governor*, 1 Ark. 570;
State v Drew, 17 Fla. 67;
State v Towns, 8 Ga. 360;
State v Governor, 39 Mo. 388.

⁷ *Governor v Nelson*, 6 Ind. 496;
Baker v Kirk, 33 Ind. 517;
Magruder v Swann, 25 Md. 173;
Groome v Gwinn, 43 Md. 572.

independence of the executive, and the constitutional separation of the executive and judicial departments; and others; on the ground of the inconvenience and obstruction of public business, which would result, if the governor of the state was liable to respond continually to litigations, and to be imprisoned for disobedience to the commands of the process of the courts;¹ while other adjudications, of equal weight of authority, hold that the governor, like any other public officer, may be compelled by mandamus or other appropriate process, to perform any ministerial duty, not resting within his own discretion, or left to depend exclusively upon his own judgment.²

§ 797. **Doctrine as to other principal officers of government.**—A similar question has arisen, with respect to other principal officers of the government. In England, the court of queen's bench has held, that a mandamus will not lie against the lords commissioners of the treasury to compel them to take the necessary measures to cause to be refunded money received by them, as servants of

¹ *State v Drew*, 17 Fla. 67;
State v Towns, 8 Ga. 360;
People v Bissell, 19 Ill. 229;
People v Yates, 40 Ill. 126;
People v Cullom, 100 Ill. 472;
State v Warmoth, 22 La. Ann. 1; s. c.
 24 La. Ann. 351;
In re Dennett, 32 Me. 508;
People v Governor, 29 Mich. 320;
Chamberlain v Sibley, 4 Minn. 309;
Rice v Austin, 19 Minn. 103;
Western R. R. Comp'y v De Graff, 27
 Minn. 1;
Vicksburg, etc., R. R. Comp'y v Lowry,
 61 Miss. 102;
Pacific R. R. Comp'y v Governor, 23
 Mo. 353;
State v Governor, 39 Mo. 388;
State v Governor, 25 N. J. L. 331.
 See also, *State v Johnson*, 28 La. Ann.

932; and cases cited p. 760, note 2,
post.

² *Tennessee, etc., R. R. Comp'y v Moore*,
 36 Ala. 371;
Middleton v Low, 30 Cala. 596;
Herpending v Haight, 39 Cala. 189;
Gray v State, 72 Ind. 567, following
Governor v Nelson, 6 Ind. 496 and
Baker v Kirk, 33 Ind. 517;
Hovey v State, 119 Ind. 386;
State v Kirkwood, 14 Iowa 162;
In re Cunningham, 14 Kan. 416;
Martin v Ingham, 38 Kan. 641;
State v Nichols, 42 La. Ann. 209,
Magruder v Swann, 25 Md. 173;
Chumaseo v Potts, 2 Monta. 242;
State v Blasdel, 4 Neva. 241;
Cotten v Ellis, 7 Jones L. (N. C.) 545;
State v Moffitt, 5 Ohio 358, at p. 362;
State v Chase, 5 Ohio St. 528.

the crown, although illegally.¹ And it has been said by Chief Justice Marshall, referring to the heads of departments or cabinet officers of the United States: "By the constitution of the United States, the president is invested with certain important political powers, in the exercise of which he is to use his own discretion, and is accountable only to his country in his political character, and to his own conscience. To aid him in the performance of these duties, he is authorized to appoint certain officers, who act by his authority, and in conformity with his orders. In such cases, their acts are his acts; and . . . there exists and can exist no power to control that discretion. The subjects are political. They respect the nation, not individual rights; and being intrusted to the executive, the decision of the executive is conclusive. . . . The acts of such an officer, as an officer, can never be examinable by the courts."² In the cases thus specified by the distinguished chief justice, there can be no doubt that the courts have no jurisdiction to control the action of the officer; and the same result would follow, with respect to corresponding cases, arising in the administration of the government of a state. But in other cases, the United States supreme court has recognized the power to grant a mandamus against an officer of the cabinet,³ as well as against other principal officers of the government, as the commissioner of patents and the commissioner of pensions,⁴ to compel them to perform ministerial duties. But neither a mandamus nor an injunction can be sustained,

¹ *Reg. v Lords Com'rs, etc.*, L. R., 7 Q. B. 387; 41 L. J., Q. B., 178; 26 L. T. 64; 20 W. R. 336.

See also, *Rex v Lords Com'rs, etc.*, 4 Ad. & El. 984.

² *Marbury v Madison*, 1 Cranch (U. S.) 137, per Marshall, Ch. J., p. 166.

The application (for a mandamus against the secretary of state) was

refused, on the ground that the court had not original jurisdiction.

³ *Kendall v United States*, 12 Pet. (U. S.) 524;

United States v Schurz, 102 U. S. 378.

⁴ *Butterworth v United States*, 112 U. S. 50;

United States v Black, 128 U. S. 40.

to control the action of such an officer, where such action rests in his judgment or discretion, or otherwise relates to the performance of his ordinary official duties, "even where those duties require an interpretation of the law."¹ In this respect, as probably in all others, except in the cases specified by Ch. J. Marshall, there appears to be, in this country, no distinction between these officers and other officers.

§ 798. **The same subject.**—The same considerations ought to govern also the case, where the action of one of the principal officers of a state is to be controlled by the process of the courts. But in some states, the proposition has been maintained, in judicial decisions, that the writ of mandamus does not lie against the principal state officers, such as the secretary of state, the state treasurer, the state auditor, etc.; on the ground that their offices are but branches of the executive department of the government, and the incumbents thereof are not subject to the control of the judicial department.² It is believed, however, that these rulings are so thoroughly in conflict with the weight of the American authorities, that they can have only a local operation. In other states, there are numerous cases, where mandamus has been sustained against the principal state officers, such

¹ *United States v Black*, 128 U. S. 40;
United States v Windom, 137 U. S. 636.
Accord, *United States v Com'r Land Office*, 5 Wall. (U. S.) 563;
Gaines v Thompson, 7 Wall. (U. S.) 347;
Litchfield v Register, etc., 9 Wall. (U. S.) 575;
Secretary v McGarrahan, 9 Wall. (U. S.) 298.
 See also, *Decatur v Paulding*, 14 Pet. (U. S.) 497.

² *State v Dike*, 20 Minn. 363;
State v Whitcomb, 28 Minn. 50;
Secombe v Kittelson, 29 Minn. 555, at p. 561;
State v Deslonde, 27 La. Ann. 71.
 See also, *People v Hatch*, 33 Ill. 9;
Bledsoe v International R. R. Comp'y, 40 Tex. 537;
Galveston, etc., R. R. Comp'y v Gross, 47 Tex. 428;
Chalk v Darden, 47 Tex. 438.

as the secretary of state,¹ the comptroller,² the state auditor,³ the register of the state land office, and the state treasurer.⁴ But these officers are not subject to the control of the courts, in cases where such control would involve also control of the state in its sovereign capacity. Thus, a suit against a state and the state auditor, to compel the levy of taxes, and the application of the money so raised to the payment of bonds issued by the state, is practically a suit against the state only, and, not being maintainable against the state, it cannot be maintained against the auditor.*

§ 799. No question has arisen as to other officers.—No question, as far as the author's examination has enabled him to discover, has been raised, respecting the liability of any other public officer, to be controlled in his official action by the process of the courts, subject to the general rules of law, governing the cases, wherein the remedies hereinafter considered will or will not lie; which will be stated, with respect to each of those remedies, in connection with the other rules of law relating thereto.

¹ *State v Lawrence*, 3 Kan. 95;
State v Barker, 4 Kan. 379;
State v Wrotnowski, 17 La. Ann. 156;
State v Sec. of State, 33 Mo. 293;
People v Carr, 36 N. Y. 512;
State v Doyle, 40 Wis. 175.
 See also, *People v Sec. of State*, 53 Ill. 90.

² *People v Allen*, 1 Lans. (N. Y.) 248;
People v Allen, 42 N. Y. 404;
People v Comptroller, 77 N. Y. 45, 50;
People v Chapin, 104 N. Y. 96;
People v Chapin, 105 N. Y. 309.
 See also, *Fowler v Peirce*, 2 Cala. 165;
People v Brooks, 16 Cala. 11;
State v Gamble, 13 Fla. 9.

³ *Smith v Strobach*, 50 Ala. 462;
Danley v Whiteley, 14 Ark. 687;
People v Smith, 43 Ill. 219;
Bryan v Cattell, 15 Iowa 538;
State v Bordelon, 6 La. Ann. 68;

People v Auditor General, 9 Mich. 141;
People v State Auditors, 42 Mich. 422;
Lachance v Auditor General, 77 Mich. 563;
McCulloch v Stone, 64 Miss. 378;
People v Benton, 27 N. Y. 387;
People v Schuyler, 79 N. Y. 189;
Citizens' Bank v Wright, 6 Ohio St. 318.

⁴ *Ex parte Selma*, etc., R. R. Comp'y, 46 Ala. 423;
State v Francis, 23 Kan. 495;
Hommerich v Hunter, 14 La. Ann. 221;
State v Dubuclet, 26 La. Ann. 127;
State v Nichols, 42 La. Ann. 209;
People v State Treasurer, 23 Mich. 499;
People v State Treasurer, 24 Mich. 468;
Northwestern, etc., R. R. Comp'y v Jenkins, 65 N. C. 173.

⁵ *North Carolina v Temple*, 134 U. S. 22.

II. *Certiorari*.

§ 800. **At common law ; and as extended by statute.**—At common law, the writ of certiorari lies, only to bring up a record; but, in addition to the cases where it lies at common law, it is given by statute, in nearly all the states, in particular cases, where an officer or a body of officers exercise *quasi* judicial powers. In such cases, unless the statute contains special directions to the contrary, the effect is merely to extend the office of the writ to the cases specified; the rules relating to the granting thereof, the proceedings thereupon, the questions which may be reviewed, and all other matters relating thereto, are the same, as upon a common law certiorari. Numerous cases, arising upon the statutory certiorari, to review the proceedings of officers and boards in the removal of subordinate officers, which were cited in a former chapter, illustrate this proposition.¹

§ 801. **The writ and its office defined.**—The office of a certiorari has been well defined, by a learned chief justice of the supreme judicial court of Massachusetts, as follows: “A writ of certiorari lies only to correct the errors and restrain the excesses of jurisdiction of inferior courts, or officers acting judicially. It lies to correct the errors of inferior courts or judicial officers, acting in proceedings not according to the course of the common law; and where errors cannot be corrected by appeal or exceptions, or by a writ of error. Thus, it is the proper remedy to revise the proceedings of county commissioners, or of city councils, or of boards of aldermen, when they act in matters like the laying out of highways, or making assessments for sewers, or other improvements. The reason is, that in such matters they act judicially, and not merely

¹ *Ante*, ch. 16, *passim*. And see, *People v Parker*, 117 N. Y. 86, cited *post*, § 807.

as ministerial or executive officers.”¹ Other definitions, substantially to the same effect, are given in the cases cited by the learned chief justice, and others given in the note.²

§ 802. **Confined to the review of judicial or quasi judicial decisions; instances.**—The writ lies only to review a judicial decision, or a *quasi* judicial decision; but the mere fact that an officer exercises judgment in deciding the matter before him, does not make his decision of a judicial character, so that it may be reviewed by certiorari.³ It will lie to review the proceedings of the common council of a city, supervisors, county commissioners or other officers or bodies charged with similar powers, in laying out and opening roads, ditches, etc., directing the erection of bridges, equalizing taxes, deciding contested elections, and the like.⁴ And, where a permanent official body is

¹ *Attorney General v Northampton*, 143 Mass. 589, per Morton, Ch. J., citing the following cases:

Parks v Boston, 8 Pick. (Mass.) 218;
Fay, petitioner, 15 Pick. (Mass.) 243;
Robbins v Lexington, 8 Cush. (Mass.) 292;
Dwight v Springfield, 4 Gray (Mass.) 107;
Lowell v Co. Com'rs, 6 Allen (Mass.) 131;
Farmington R. W. P. Comp'y v Co. Com'rs, 112 Mass. 206;
Powers v Springfield, 116 Mass. 84;
Locke v Lexington, 122 Mass. 290;
Lynch v Crosby, 134 Mass. 313;
Snow v Fitchburg, 136 Mass. 179.

² *Co. Com'rs v Hearne*, 59 Ala. 371;
Miller v School Trustees, 88 Ill. 26;
State v Coco, 42 La. Ann. 408;
State v Judge, 42 La. Ann. 1,089;
³ *Lapan v Co. Com'rs*, 65 Me. 160;
Hannibal, etc., R. R. Comp'y v State Ed. of Equalization, 64 Mo. 294;
State v City Council, 39 N. J. L. 416;
People v Brooklyn, 8 Hun (N. Y.) 56;
People v Sup'rs, 25 Hun (N. Y.) 131;

People v Mosier, 56 Hun (N. Y.) 64;
People v Stedman, 57 Hun (N. Y.) 280;
Roulhac v Miller, 89 N. C. 190;
State v Herndon, 107 N. C. 934.

⁴ *People v Walter*, 68 N. Y. 403;
People v Park Com'rs, 97 N. Y. 37.
 See also, *ante*, §§ 537-539.

Ante, § 801, and cases cited.
 See also, *Ex parte Keenan*, 21 Ala. 558;
People v Delegates Fire Dep't, 14 Cala. 479;
Keys v Marin Co., 42 Cala. 252;
Harney v Sup'rs, 44 Iowa 203;
Royce v Jenney, 50 Iowa 676;
Remy v Board of Equalization, 80 Iowa 470;
Farmington R. W. P. Comp'y v Co. Com'rs, 112 Mass. 206;
Tewksbury v Co. Com'rs, 117 Mass. 563;
People v Brighton, 20 Mich. 57;
Names v Highway Com'rs, 30 Mich. 490;
Sherwood v Duluth, 40 Minn. 22;
Dorchester v Wentworth, 31 N. H. 451;
People v Gilon, 121 N. Y. 551;
French v Barré, 58 Vt. 567;
Chenowith v Co. Com'rs, 26 W. Va. 230.

clothed with the power, and charged with the duty, to do certain official acts, without being limited as to time, if a former determination of such a body is reversed or set aside, it is capable of performing the duty at a subsequent time; and in such a case a certiorari lies to review its proceedings, although the individuals who made the determination have ceased to be officers, and the record of their proceedings has passed into the custody of another authority.¹ The writ is not taken away by statutory expressions, which can be otherwise construed, as that the decision shall be final, or *res adjudicata*, or the like; but only by express language.² But the legislative or *quasi* legislative action of such bodies cannot be reviewed by certiorari;³ nor will a certiorari lie to review any other action of such bodies, which is not judicial in its character.⁴ Thus, a certiorari will not lie to review the action of supervisors, county commissioners, school officers, or other bodies having similar powers, in forming a school district;⁵ in adopting school text books;⁶ or in organizing a new township or land district.⁷ So, proceedings for the appointment, by the common council of a city, of a municipal officer, cannot, in the absence of an express statutory provision be reviewed by certiorari, for the act is administrative in his character, although, like most administrative duties it involves the exercise of judg-

¹ *People v Gilon*, 121 N. Y. 551.

² *Sherwood v Duluth*, 40 Minn. 22;

State v Graham, 60 Wis. 395.

See, however, *People v Court of Sessions*, 45 Hun (N. Y.) 54.

³ *Iske v Newton*, 54 Iowa 586;

In re Wilson, 32 Minn. 145;

Lemont v Dodge Co., 39 Minn. 385;

People v Sup'rs, 25 Hun (N. Y.) 131.

⁴ *Townsend v Copeland*, 56 Cal. 612;

Parks v Boston, 8 Pick. (Mass.) 217;

Locke v Lexington, 122 Mass. 290.

⁵ *Lemont v Dodge Co.*, 39 Minn. 385.

⁶ *People v Oakland B'd of Ed'n*, 54 Cal. 375.

⁷ *Williams v Sup'rs*, 65 Cal. 160;

Christlieb v Hennepin Co., 41 Minn.

142. But it has been held, that the writ will lie, to review the act of the superintendent of public instruction, in dividing school districts.

State v Whitford, 54 Wis. 150.

See also, *Trustees, etc., v School Directors*, 88 Ill. 100.

ment and discretion.¹ And it is not the province of a certiorari to try the title to an office;² even although the person appointed to the office has not entered upon the duties thereof, for which reason, an information in the nature of a quo warranto will not lie against him.³ These examples suffice, to illustrate the distinction between legislative, ministerial, and judicial action, which has been fully considered in former pages of this work.⁴ The adjudications respecting the cases, wherein the function exercised is of such a character, that a certiorari will or will not lie, are very numerous, and not always harmonious; some additional authorities thereupon are collected in the note.⁵

¹ *Att'y Gen'l v Northampton*, 143 Mass. 589.

See also, *Op'n of the Just.*, 138 Mass. 601.

² *Donough v Dewey*, 82 Mich. 309, at pp. 314, 315.

³ *Simon v Hoboken*, 52 N. J. L. 367.

The contrary was held in *State v Camden*, 39 N. J. L. 416, which is in effect overruled by this decision, and by *State v Camden*, 47 N. J. L. 454.

⁴ *Ante*, ch. 23.

⁵ *Carroll v Mayor, etc.*, 12 Ala. 173;

Payne v McCabe, 37 Ark. 318;

Williams v Sup'rs, 65 Cal. 160;

Tilton v Agr'l Ass'n, 6 Colo. 288;

Ohm v Super. Ct., 85 Cal. 545;

Harrell v Holt, 76 Ga. 25;

Holliday v Poole, 77 Ga. 159;

Waverly v Kemper, 88 Ill. 579;

Indiana, etc., R. R. Comp'y v McCoy, 23 Ill. App. 143;

Jordon v Hayne, 36 Iowa 9;

Dyer v Lowell, 30 Me. 217.

Sup'rs v Auditor General, 27 Mich. 165;

Townsend v Tudor, 41 Mich. 263;

Merrick v Township Board, 41 Mich. 630;

Dunlap v Toledo, etc., R. R. Comp'y, 46 Mich. 190;

Garvin v Gorman, 63 Mich. 221;

State v St. Paul, 34 Minn. 250;

In re Saline Co., 45 Mo. 52;

St. Charles v Rogers, 49 Mo. 530;

State v Paterson, 39 N. J. L. 489;

Mowery v Camden, 49 N. J. L. 106;

Stone v Mayor, etc., 25 Wend. (N. Y.) 157;

People v Mayor, etc., 2 Hill (N. Y.) 9;

People v Cobb, 14 Abb. N. C. (N. Y.) 493;

In re Lauterjung, 48 N. Y. Super. Ct. 308;

People v Weaver, 34 Hun (N. Y.) 321;

People v Dunkirk, 38 Hun (N. Y.) 7;

People v Carter, 52 Hun (N. Y.) 458;

People v Assessors, 39 N. Y. 81;

People v Assessors, 40 N. Y. 154;

People v Park Com'rs, 97 N. Y. 37;

People v Chapin, 104 N. Y. 369;

People v Chapin, 106 N. Y. 265;

People v Jones, 112 N. Y. 597;

Smith v Abrams, 90 N. C. 21;

Lowe v Elliott, 107 N. C. 718;

Cox v Kent, 9 Baxt. (Tenn.) 492;

Milwaukee Iron Comp'y v Schubel, 29 Wis. 444;

State v Whitford, 54 Wis. 150.

See also, *ante*, §§ 370, 379, 381, 383, 387, 392, 394-398, 510, 522.

§ 803. **Not a writ of right; but lies in discretion.**—A certiorari is not a writ of right; it can issue only by special leave of the court, upon an application therefor, and the granting or refusing the writ is discretionary with the court to which the application is made;¹ and, although it is said in many cases, that the discretion must be sound, and exercised according to the rules of law, the decision of the court upon the application is in general practically conclusive, since it cannot be reviewed upon appeal to another court;² although the judicial system of some of the states allows an appeal to be taken to another branch of the same court, in which the discretion may be reviewed. Thus, where a certiorari has been lawfully issued by the special term of the supreme court of New York, the general term of the same court may quash it or refuse to quash it, and its decision thereupon cannot be reviewed by the court of appeals.³ But where a certiorari was granted, in a case where the writ does not lie, an order refusing to quash it may be reviewed on appeal.⁴ And an order of the general term of the supreme court, quashing a certiorari issued by the special term, may be reviewed by the court of appeals, where the order was erroneously granted, on the ground of want of power to issue the writ, for in such a case the general term failed to exercise its discretion.⁵

§ 804. **Effect of laches.**—As a general rule, the writ will not be granted, or, if granted, will be dismissed, unless the

¹ *Ex parte Pearce*, 44 Ark. 509;
Sup'rs v Magoon, 109 Ill. 142;
Gaither v Watkins, 66 Md. 576;
Gager v Sup'rs, 47 Mich. 167;
People v Andrews, 52 N. Y. 445;
Walbridge v Walbridge, 46 Vt. 617;
Knapp v Heller, 32 Wis. 467, and cases
 subsequently cited in this section,
 and in the next section.

² *People v Police Com'rs*, 82 N. Y. 506;

People v Tax Com'rs, etc., 85 N. Y. 655.
 See also, *People v Stilwell*, 19 N. Y. 531;
People v Hill, 53 N. Y. 547;
People v McCarthy, 102 N. Y. 630.
Contra, Trustees, etc., v School Directors, 88 Ill. 100.

³ *Jones v People*, 79 N. Y. 45.

⁴ *People v Park Com'rs*, 97 N. Y. 37.

⁵ *People v McCarthy*, 102 N. Y. 630, per
 Ruger, Ch. J., at p. 635.

applicant has acted promptly after his grievance arose; for laches will usually constitute a sufficient reason for refusing the writ;¹ especially if new interests have intervened during the delay.² And *a fortiori*, one who has stood by, pending the progress of a public work, cannot, after its completion, attack the preliminary proceedings by certiorari.³

§ 805. Will not lie where there is adequate relief by appeal, etc.—A certiorari will not lie, where the party may have adequate relief against the grievance of which he complains by writ of error, appeal, exceptions, or other remedy.⁴ And, generally, the court will grant a certiorari

¹ *Keys v Marin Co.*, 42 Cal. 252;
Hagar v Sup'rs, 47 Cal. 222;
Kimple v Super. Ct., 66 Cal. 136;
Dye v Noel, 85 Ill. 290;

Trustees, etc., v School Directors, 88 Ill. 100;

Rentz v Detroit, 48 Mich. 544;

Carpenter v Highway Com'rs, 64 Mich. 476;

People v Utica, 65 Barb. (N. Y.) 9;

Elmendorf v Mayor, etc., 25 Wend. (N. Y.) 693;

People v Fire Com'rs, 77 N. Y. 605, and cases cited:

Peebles v Breaswell, 107 N. C. 68;

Dailey v Bartholomew, 1 Ashmead (Pa.) 135;

State v Milwaukee Co., 58 Wis. 4.

See also, *Chamberlin v Barclay*, 13 N. J. L. 244;

Bell v Overseers, 14 N. J. L. 131;

People v Mayor, etc., 2 Hill (N. Y.) 9;

People v Hill, 53 N. Y. 547.

A distinguished judge has said, that the writ ought to be applied for "with special alacrity." *Rentz v Detroit*, 48 Mich. 544, per Cooley, J., at p. 547. In New York the courts have ruled, that a certiorari will not be granted after the expiration of two years. *People v Perry*, 16 N. Y. 461, and cases cited; *Elmendorf v*

Mayor, etc., 25 Wend. (N. Y.) 693;
People v Hill, 53 N. Y. 547.

So held, also, in *Wisconsin. State v Milwaukee Co.*, 58 Wis. 4.

² *Willson v Gifford*, 42 Mich. 454.

See also, *Dunlap v Toledo, etc., R. R. Comp'y*, 46 Mich. 190;

Bresler v Ellis, 46 Mich. 335.

³ *State v Rutherford*, 52 N. J. L. 501.

⁴ *Alabama G. S. R. R. Comp'y v Christian*, 82 Ala. 307;

Pettigrew v Washington Co., 43 Ark. 33;

Carolan v Carolan, 47 Ark. 511;

Newman v Super. Ct., 62 Cal. 545;

Stuttmeister v Super Ct., 71 Cal. 322;

McCue v Super. Ct., 71 Cal. 545;

Gibson v Super. Ct., 85 Cal. 216;

Wilson v Burks, 71 Ga. 862;

Darmstaedter v Armour, 17 Ill. App. 285;

Cedar Rapids, etc., R'y Comp'y v Whelan, 64 Iowa 694;

Ransom v Cummins, 66 Iowa 137;

Hodgdon v Co. Com'rs, 68 Me. 226;

Gaither v Watkins, 66 Md. 576;

Farrell v Taylor, 12 Mich. 113;

Specht v Detroit, 20 Mich. 168;

Smith v Reed, 24 Mich. 240;

Ishpeming v Maroney, 49 Mich. 226;

upon a judgment, where there is no right of appeal;¹ or where there was a right of appeal, but the applicant has lost it; through some cause other than his own inexcusable laches or other default.² And it has been held, that the allowance of a certiorari is not absolutely prohibited, although there is a remedy by appeal; and that it will be sustained even in such a case, if the court, in the exercise of its discretion, sees fit to grant it.³

§ 806. **Nor to review an executed decision.**—A certiorari will not be granted to review a decision, which has been so far executed, that the matter to be reviewed has passed out of the hands of the court, body, or other tribunal, by which the decision was made. Thus, in the supreme court of New York, an application for a certiorari to the common council of a city and the tax receiver thereof, to review an assessment levied upon the relator, was denied, where the assessment roll had already been delivered to the tax receiver, on the ground that “the roll, having passed from those officers who had any judicial or *quasi* judicial control over it, and having been placed

Tucker v Parker, 50 Mich. 5;
Galloway v Corbitt, 52 Mich. 460;
Garvin v Gorman, 63 Mich. 221;
State v Co. Court, 80 Mo. 500;
Logue v Clark, 62 N. H. 184;
State v Lowery, 49 N. J. L. 391;

People v Walsh, 67 How. Pr. (N. Y.) 482;

People v Dennison, 28 Hun (N. Y.) 328;
People v Sup'rs, 49 Hun (N. Y.) 476;
Williamson v Boykin, 99 N. C. 238;
Meeks v Windon, 10 W. Va. 180;
Beasley v Beckley, 28 W. Va. 81.

As to the adequacy of the other remedy, see People v Sup'rs, 34 N. Y. 516, per Peckham, J., at p. 518.

The rule is the same, although the other remedy has been newly given by statute. People v Lohnas, 54 Hun (N. Y.) 604.

¹ People v Rochester, 44 Hun (N. Y.) 166, at p. 172.

Accord, Carpenter v Super. Ct., 75 Cal. 596.

See also, People v Mosier, 56 Hun (N. Y.) 64.

² Payne v McCabe, 37 Ark. 318;
Tilton v Ag'l, etc., Ass'n, 6 Colo. 288;
Kern v Davis, 7 Ill. App. 407;
Waverly v Kemper, 88 Ill. 579;
Territory v Valdez, 1 New Mex. 533;
Scroggs v Alexander, 88 N. C. 64;
Wiley v Lineberry, 88 N. C. 68;
Roulhac v Miller, 89 N. C. 190;
Smith v Abrams, 90 N. C. 21;
Cox v Kent, 9 Baxt. (Tenn.) 492.

³ People v Donohue, 15 Hun (N. Y.) 418.
See also, People v Perry, 16 Hun (N. Y.) 461.

in the hands of a mere ministerial officer, who had no power to correct errors in it, the writ of certiorari accomplishes nothing under such circumstances.”¹ Upon the same principle, it was held, by the same court, that a certiorari would not lie to the assessors, to compel the correction of an assessment roll, where the roll had passed from the assessors to the supervisors, although the supervisors were included in the writ.² And that it was too late for a certiorari against the board of supervisors, to review their allowance of a claim, where the warrant had been issued, and the money had been collected, and was in the hands of the county treasurer, to pay the claim.³

§ 807. **Nor to review a void decision.**—A certiorari will not lie to review a void decision. Thus, where it was found that two persons, who made up an assessment roll, were not assessors either *de jure* or *de facto*, it was held, that a certiorari given by a statute, to review and correct erroneous assessments, could not be maintained; that the object of the statute was merely to furnish a new remedy, to be applied according to the rules of law governing a common law certiorari; that “the function of the writ of certiorari is to review the judicial action of inferior officers or tribunals; it assumes their existence, and the fact of official action, but draws in question the legality and correctness of that action; it is wholly unsuited to a case where there is no officer and no tribunal, and where, as a consequence, there could not have been any judicial action, or anything to review.” In this

¹ *People v Dunkirk*, 38 Hun (N. Y.) 7; citing *People v Reddy*, 43 Barb. (N. Y.) 539; *People v Fredericks*, 48 Barb. (N. Y.) 173; *People v Tax Com'rs*, 9 Hun (N. Y.) 609; *People v Board of Assessors*, 16 Hun (N. Y.) 407.

See also, *People v Sup'rs*, 82 N. Y. 275. The doctrine of these cases criticized, and a distinction established, in *People v Gilon*, 121 N. Y. 551.

² *People v Tompkins*, 40 Hun (N. Y.) 228.

³ *People v Supervisors*, 34 Hun (N. Y.) 266.

case, the party sought to make the certiorari usurp the functions of a quo warranto.¹ This decision seems to rest partly on the principle, that a certiorari will not lie, where the party can have adequate relief by action or otherwise, and partly on the doctrine that a certiorari will not lie, unless it appears that the applicant will suffer a substantial injury, if the certiorari is withheld.²

§ 808. **Doctrine that the decision to be reviewed must be final.**—As a general rule, a certiorari will not lie in this country, until there has been a final decision of the matter, by the tribunal against which the application asks that it shall be issued.³ And where a statute authorized the state comptroller, if he should discover that a sale of land for taxes was invalid, to cancel the sale and refund the purchase money; it was held, that the statute was for the benefit of the purchaser; that the owner of the land was not a party to the proceedings before the comptroller; and that he could not review the decision of the comptroller, denying his petition to cancel the sale of his land, inasmuch as the comptroller “has no judicial power to determine a controversy between

¹ *People v Parker*, 117 N. Y. 86, following *People v Covert*, 1 Hill (N. Y.) 674.

See also, *Locke v Lexington*, 122 Mass. 290, per Gray, Ch. J.;

People v Moore, 16 N. Y. State Rep'r 469; 1 N. Y. Supp. 405.

Held otherwise in *Null v Zierle*, 52 Mich. 540. And see *Mowery v Camden*, 49 N. J. L. 106; *People v Jones*, 112 N. Y. 597, modifying and aff'g 49 Hun (N. Y.) 365.

² *People v Leavitt*, 41 Mich. 470;

State v Lamberton, 37 Minn. 362.

See also, *People v Chapin*, 104 N. Y. 369, cited in the next succeeding section.

³ *Sayers v Super. Ct.*, 84 Cal. 642;

Schwarz v Co. Ct., 14 Colo. 44.

State v Noonan, 24 Minn. 124;

Grinager v Norway, 33 Minn. 127;

State v Dist. Court, 44 Minn. 244;

Lynde v Noble, 20 Johns. (N. Y.) 80;

People v Sup'rs, 15 Wend. (N. Y.) 198, at p. 211;

People v Sup'rs, 1 Hill (N. Y.) 195;

Devlin v Platt, 11 Abb. Pr. (N. Y.) 398;

People v Peabody, 26 Barb. (N. Y.) 437;

People v Com. Council, 65 Barb. (N. Y.)

9; 45 How. Pr. (N. Y.) 289;

People v Trustees, etc., 3 Hun (N. Y.)

549; 5 T. & C. (N. Y.) 609;

Helf v Shulze, 10 Ohio 263.

This is an American rule, for at common law, a certiorari lies either before or after judgment. *Powell App. Pro.*, p. 411.

other parties, but to 'discover' a fact, which, when found, is to determine his own conduct."¹ But there are some adjudications, establishing exceptions to the rule, requiring a final decision. Thus it has been held, in New Jersey, that a certiorari lies before final decision to a special tribunal, proceeding summarily in a matter, of which it has not acquired jurisdiction;² and that the rule, that a certiorari will not be allowed before a final decision in the inferior tribunal, is confined to cases where the office of the writ is in the nature of a writ of error; it is not applicable to a case, where the writ is designed to review municipal proceedings, in which case its allowance before a final decision is discretionary.³ A case in New York, which has been cited in opposition to the rule, turned upon the construction of the statute, regulating proceedings in forcible entry and detainer.⁴

§ 809. **Exception where decision must be approved by another officer.**—Where a statute gave the power of removal of certain city officers, "to the mayor, for cause, and after opportunity to be heard, subject, however, before such removal shall take effect, to the approval of the governor, expressed in writing;" it was held, that the proceedings of the mayor, in granting an order for the removal of such an officer, might be reviewed upon certiorari, although the governor had not acted upon them, on the ground that the mayor's order was the final judgment to be reviewed, although it remained in abeyance until the governor's approval; and that it was doubtful whether the courts had the power to review the action of the governor, after his approval.⁵

¹ *People v Chapin*, 104 N. Y. 369, citing
People v Fairchild, 67 N. Y. 334.

² *Mowery v Camden*, 49 N. J. L. 106.

³ *State v Paterson*, 39 N. J. L. 489, following
State v Paterson, 34 N. J. L. 163;

State v Jersey City, 35 N. J. L. 404;
State v Hudson Co. Avenue Com'rs,
37 N. J. L. 12.

⁴ *People v Covill*, 20 Hun (N. Y.) 480.

⁵ *People v Cooper*, 21 Hun (N. Y.) 517.

§ 810. **Decision resting in discretion cannot be reviewed.**—A certiorari will not lie, to review a decision, which rested in the discretion of the tribunal below, or in its judgment as to the expediency and propriety of the decision rendered.¹ But where it appears that the discretion or judgment has not been exercised, by reason of an erroneous decision upon a preliminary point, the writ will lie. Thus, where a statute of New York authorized the commissioners of the land office, to grant lands of the state, under water, to the owner of the adjoining uplands; it was held, that although the discretion of the commissioners, as to whether the grant should or should not be made, could not be controlled by the court, yet where it appeared, that upon an application for such a grant, they had decided that the applicant was not the owner of the adjoining uplands, and therefore was not entitled to the grant under the statute, their decision upon that point might be reviewed by certiorari.²

§ 811. **What questions may be reviewed.**—A certiorari lies only for errors of law, and, if granted, it brings up for review only errors of law. Thus it has been often held, that the finding of the facts by the tribunal to which it is directed, upon conflicting evidence, cannot be reviewed upon certiorari; that the only questions to be examined are, whether the inferior tribunal had jurisdiction of the subject matter, and of the person or property affected by its decision; whether there was evidence of all the facts, necessary to sustain the decision; “whether there was any legal evidence tending to the conclusion;

¹ *Benton v Taylor*, 46 Ala. 388;
Ketchum v Super. Ct., 65 Cal. 494;
Hildreth v Crawford, 65 Iowa 339;
Supervisors v Auditor General, 27 Mich. 165;
Schwab v Coots, 44 Mich. 463;
State v Trinity Church, 45 N. J. L. 230;
People v Excise Bd, 24 Hun (N. Y.) 195;

People v Park Com'rs, 97 N. Y. 37;
People v Fire Com'rs, 100 N. Y. 82; and
ante, §§ 394–396.
² *People v Jones*, 112 N. Y. 597, aff'g 49 Hun (N. Y.) 365.
 See also, *People v McCarthy*, 102 N. Y. 630, cited *ante*, § 803.

and whether any errors of law affected the ultimate decision.”¹ The doctrine, to be found in several recent decisions in New York, that the court may, upon certiorari, pass upon questions of fact arising upon conflicting evidence, to the extent that it will reverse the decision of the inferior tribunal, if there was such a preponderance of evidence against its finding, that it would set aside the verdict of a jury to the same effect, upon a trial by a jury, is derived from a peculiar provision of the statute of that state, and is not the rule of the common law.² So it has been held, in New York, that upon a statutory certiorari, “in order to make a ground for reversal, other than that based upon the conclusions from the proofs,” it is necessary, that the attention of the tribunal below, “should have been called to the error in the examination, or in the admission or exclusion of evidence, by an objection, which states the vice or illegality complained of.”³ If the inferior tribunal had authority to make the decision complained of, an error in the exercise of such authority must be corrected by appeal, not by

¹ *People v Christie*, 115 N. Y. 158;
People v Rand, 41 Hun (N. Y.) 529, reviewing the decision of a court martial.

See also, *Baxter v Brooks*, 29 Ark. 173;

Andrews v Pratt, 44 Cala. 309;

Monreal v Bush, 46 Cala. 79;

Sayers v Super. Ct., 84 Cala. 642;

Barber v Harris, 6 Mackey (D. C.) 586;

Singer Man. Comp'y v Cole, 78 Ga. 353;

Farmer v Rogers, 85 Ga. 290;

Chicago, etc., R. R. Comp'y v Fell, 22 Ill. 333;

Hamilton v Harwood, 113 Ill. 154;

Lapan v Co. Com'rs, 65 Me. 160;

Farmington R. W. P. Comp'y v Co. Com'rs, 112 Mass. 206;

Jackson v People, 9 Mich. 111;

Genesee Co. Sav. Bank v Michigan Barge Comp'y, 52 Mich. 164;

St. Paul v Marvin, 16 Minn. 102;

Brown v Ramsay, 29 N. J. L. 117;

State v Hudson, 32 N. J. L. 365;

People v Williams, 17 Abb. N. C. (N. Y.) 366;

People v McCarthy, 102 N. Y. 630;

People v Hicks, 105 N. Y. 198;

People v Coleman, 107 N. Y. 541;

People v McClave, 29 N. Y. St. Rep'r 366; 8 N. Y. Supp. 515, aff'd (no opin.) 121 N. Y. 677;

People v French, 29 N. Y. St. Rep'r 304; 8 N. Y. Supp. 459;

State v Whitford, 54 Wis. 150, and cases cited *ante*, § 398.

² *People v French*, 119 N. Y. 502, distinguishing *People v French*, 119 N. Y. 493.

³ *People v McClave*, 123 N. Y. 512.

certiorari.¹ Mere irregularities in the proceedings, not affecting the jurisdiction, or property, or other rights, cannot be considered upon a certiorari.²

III. *Mandamus.*

§ 812. **Origin and nature of the writ.**—The writ of mandamus was also originally a prerogative writ. and in England, it still retains some of the characteristics of such a writ; but in the United States, it has lost all those characteristics, and is only “an ordinary process,” whereby a civil action is commenced between the parties;³ although it issues in behalf of the sovereign power, and otherwise assumes the form of a criminal proceeding. It is an original common law writ, which a court of equity has no inherent jurisdiction to issue;⁴ and the granting of it is not the exercise of appellate jurisdiction, so that a court, whose jurisdiction is solely appellate, has no power to grant it, except in aid of its appellate proceedings; and a statute conferring the power to grant it upon a court, whose jurisdiction is confined by the constitution to appellate proceedings, is unconstitutional.⁵

§ 813. **Its office defined.**—The office of the writ has been very clearly and comprehensively stated by a learned judge, as follows: “The writ of mandamus is, in form, a command, in the name of the state, directed to

¹ *Loaiza v Super. Ct.*, 85 Cal. 11.

² *Donough v Dewey*, 82 Mich. 309.

³ *Kentucky v Dennison*, 24 How. (U. S.) 66, per Taney, Ch. J., p. 97.

See also, *State v Williams*, 69 Ala. 311;

Gilman v Bassett, 33 Conn. 298, at p. 305;

People v Weber, 86 Ill. 283;

State v Bailey, 7 Iowa 390, at p. 397;

State v Gracey, 11 Neva. 223;

Arberry v Beavers, 6 Tex. 457;

Kendall v United States, 12 Pet. (U. S.)

524;

Kendall v Stokes, 3 How. (U. S.) 87, at p. 100.

⁴ *Gay v Gilmore*, 76 Ga. 725.

⁵ *Westbrook v Wicks*, 36 Iowa 382;

Morgan v Register, Hardin (Ky.) 609;

Daniel v Co. Court, 1 Bibb (Ky.) 496;

Whitfield v Greer, 3 Baxt. (Tenn.) 78;

State v Hall, 6 Baxt. (Tenn.) 3;

Kentucky v Dennison, 24 How. (U. S.) 66.

See also, *Hawes v People*, 129 Ill. 123.

some tribunal, corporation, or public officer, requiring them to do some particular thing therein specified, and which the court has previously determined that it is the duty of such tribunals or other person to perform. It issues, in England, only out of the king's bench, the highest court" (of original common law jurisdiction) "in the kingdom; and was introduced, it is said, in order to prevent disorder from a failure of justice, or defect of police; and is therefore granted only in cases, where the law has provided no specific remedy, and in justice and good government there ought to be one. It does not lie to correct the errors of inferior tribunals, by annulling what they have done erroneously; nor to guide their discretion; nor to restrain them from exercising power not delegated to them; but it is emphatically a writ, requiring the tribunal or person, to whom it is directed, to do some particular act, appertaining to their public duty, and which the prosecutor has a right to have done."¹ Other definitions of the writ, and the office thereof, not materially varying from this, will be found in the cases cited in the note.² Of course, we have no concern, in this work, with so much of the office of the writ, as relates to private corporations, and the officers and members thereof, except where the ruling upon mandamus, in such a case, establishes or illustrates principles, relating also to a man-

¹ *Dunklin Co. v District Court*, 23 Mo 449, per Leonard, J., p. 454.

² *People v Dist. Ct.*, 14 Colo. 396;
Keokuk v Merriam, 44 Iowa 432;
State v Police Jury, 29 La. Ann. 146;
Att'y Gen'l v Boston, 123 Mass. 460, at p. 470;
People v Supervisors, 26 Mich. 422;
State v Garesché, 3 Mo. App. 526, at p. 538;
State v Gracey, 11 Neva. 223;
People v Sup'rs, 67 N. Y. 330;
People v Sup'rs, 73 N. Y. 173;

People v Wilson, 119 N. Y. 515;
People v Wendell, 57 Hun (N. Y.) 362;
Buckman v Co. Com'rs, 80 N. C. 121;
Tyler v Taylor, 29 Gratt. (Va.) 765;
Page v Clopton, 30 Gratt. (Va.) 415.
 See also, *Ex parte Grant*, 53 Ala. 16;
Chesebro v Babcock, 59 Conn. 213;
State v Herron, 29 La. Ann. 848;
Hughes v Co. Com'rs, 107 N. C. 598;
Comm. v Fidler, 136 Pa. St. 129;
Ex parte Barnwell, 8 S. C. 264;
State v Burnside, 33 S. C. 276;
Ex parte Schwab, 98 U. S. 240.

damus against a public officer, or a tribunal exercising public functions.

§ 814. **Scope of the writ.**—The writ will not lie against a member of the legislature, to compel his action with respect to a matter pertaining to his legislative duties. Thus, it cannot be granted against the speaker of the assembly, upon the application of a member, to compel him to send to the senate a bill, which the relator insists has duly passed the house, and which the speaker insists has not duly passed.¹ But the speaker may be compelled by mandamus to perform a ministerial act, as to certify the amount of mileage to which a member is entitled.² And the same rule extends to the members of a municipal legislative body. Thus, a mandamus will not be granted, to compel aldermen to attend the stated meetings of the common council, “there being no specific right involved, but only a general violation of public duty.”³ Nor will it lie to enforce the performance of merely political duties.⁴ Thus, it will not lie against the secretary of a territory, to compel him to produce and correct official documents, purporting to be a record of the proceedings of a session of the territorial legislature, no private right being involved.⁵ Its usual function is to compel the performance of a ministerial duty;⁶ and, indeed, in some cases it has been said, that the office of

¹ *Ex parte Echols*, 39 Ala. 698.

² *Ex parte Pickett*, 24 Ala. 91.

³ *People v Whipple*, 41 Mich. 548.

⁴ *Scoville v Calhoun*, 76 Ga. 268.

And see *ante*, Div. I, of this chapter.

⁵ *Clough v Curtis*, 134 U. S. 361.

⁶ *United States v Seaman*, 17 How. (U. S.) 225;

United States v Schurz, 102 U. S. 378.

See also, *People v Sexton*, 37 Cala. 532;

Barksdale v Cobb, 16 Ga. 13;

Ottawa v People, 48 Ill. 233.

State v Board of Liquidators, 23 La Ann. 388;

State v Shaw, 23 La Ann. 790;

State v Archibald, 43 Minn. 328;

Swan v Gray, 44 Miss. 393;

State v Chase, 42 Mo. App. 343;

Humboldt Co. v Co. Com'rs, 6 Neva. 30;

People v Att'y Gen'l, 22 Barb. (N. Y.) 114;

People v Brennan, 39 Barb. (N. Y.) 651;

Koonce v Co. Com'rs, 106 N. C. 192;

Ex parte Black, 1 Ohio St. 30;

Comm. v James, 135 Pa. St. 480.

the writ is confined to the performance of ministerial acts, and does not extend to judicial acts.¹ But, as we shall presently see,² it is well settled, that the writ lies to enforce the performance of *quasi* judicial acts; and it also lies, in certain cases, against a judge or other judicial officer, to compel him to do his duty in judicial proceedings. Thus, where a prisoner, before indictment, is brought before a magistrate, who refuses to hear the evidence touching his guilt, the magistrate may be compelled by mandamus to hear such evidence.³ So a mandamus lies, to compel a judge to sign and seal a bill of exceptions, settled by him;⁴ but not a particular bill of exceptions, proposed by the relator, which the judge has not settled, unless, perhaps, in a very clear case, where its correctness is shown.⁵ So a judge may be compelled by mandamus to take the bond of a clerk duly appointed, and admit him to his office.⁶ And it has been held, that a mandamus lies, where a court unlawfully refuses to allow an amendment;⁷ or to grant an appeal to which the party is entitled by law.⁸ Doubtless the correct general rule, respecting the power to control judicial action by mandamus, is the same as in the case of *quasi* judicial action, which is hereinafter considered;⁹ but many of

¹ *In re Woffenden*, 1 Arizona, 237;
State v Johnson, 23 La. Ann. 932;
State v Burnside, 33 S. C. 276;
State v County Court, 33 W. Va. 589.

² *Post*, § 820.

³ *Ex parte Mahone*, 30 Ala. 49;
People v Osborn, 38 Mich. 313.
 See also, *People v Barnes*, 66 Cal. 594.

⁴ *Hawes v People*, 129 Ill. 123.
 See also, *State v Field*, 37 Mo. App. 83;
Reagan v Copeland, 78 Tex. 551.

⁵ *Id.*; also *People v Anthony*, 129 Ill. 218; s. c., below, 25 Ill. App. 532;
Vanvabry v Staton, 88 Tenn. 334.

In *People v Anthony*, 129 Ill. 218, it was held, that where the judge

states that he is unable to determine, whether the exceptions were taken as stated, the court cannot compel him to sign and seal the bill. And in *Thornton v Hoge*, 84 Cal. 231, it was held, that if he returns that he has settled the bill, the writ will be discharged; the correctness of the settlement cannot be inquired into. See also, *Hyde v Boyle*, 86 Cal. 352.

⁶ *State v Wear*, 37 Mo. App. 325.

⁷ *Lee v Harper*, 90 Ala. 548.

⁸ *Louisville Industrial School, etc., v Louisville*, 88 Ky. 584.

⁹ *Post*, § 820.

the adjudged cases lie so near the border line, that it is difficult to determine upon which side they properly belong.¹ It is, however, clear, that where the act to be performed is purely ministerial, a judge may be compelled to perform it, although it relates to proceedings before him in his judicial capacity.²

§ 815. **Lies in the discretion of the court.**—A writ of mandamus can issue only by the special direction of the court, upon an application therefor, and is granted or refused in the discretion of the court; but “the discretion of the court to grant or refuse the writ is not absolute, but governed by legal rules, and its exercise is subject to review.”³ “The writ of mandamus is a summary remedy for want of a specific one, where there would otherwise be a failure of justice. It is based upon reasons of justice and public policy, to preserve peace, good order, and good government. It is compared to a bill in equity for specific performance. Not a writ of right, it is granted, not as of course, but only at the discretion of the court to which the application is made; and this discretion will not be exercised in favor of applicants, unless some just or useful purpose may be answered by the writ.”⁴ Accordingly, where there has been a

¹ See *State v. Dist. Judge*, 32 La. Ann. 1306;

Delhi Sch. Dist. v. Circuit Judge, 49 Mich. 432;

Lloyd v. Chambers, 56 Mich. 236;

Locke v. Speed, 62 Mich. 408;

State v. St. Louis Court, 87 Mo. 374;

State v. Allen, 92 Mo. 20;

Weeden v. Richmond, 9 R. I. 128.

² Cases cited *ante*: also *Cuthbert v. Lewis*, 6 Ala. 262;

Taylor v. Gillette, 52 Conn. 216;

Manor v. McCall, 5 Ga. 522;

State v. Dist. Court, 49 N. J. L. 537;

State v. Burgoyne, 7 Ohio St. 153;

Comm. v. Bunn, 71 Pa. St. 405.

³ *People v. Chapin*, 104 N. Y. 96, citing *People v. Com. Council*, 78 N. Y. 56.

Contra, respecting the right of review, *Chesebro v. Babcock*, 59 Conn. 213.

⁴ *State v. Graves*, 19 Md. 351, per *Bowie*, Ch. J., 374.

See also, *State v. Kirke*, 12 Fla. 278;

People v. Hatch, 33 Ill. 9; *id.*, 134;

People v. Illinois Cent. R. R. Comp'y, 62 Ill. 510;

People v. Ketchum, 72 Ill. 212;

Com'rs Highways v. People, 99 Ill. 587;

State v. Co. Com'rs, 26 Kan. 419;

State v. Co. Com'rs, 28 Kan. 67, at p. 70;

Dane v. Derby, 54 Me. 95;

Belcher v. Treat, 61 Me. 577;

considerable lapse of time, that fact will be considered; and the writ ought not, in any event, to be granted, where an action would be barred by the statute of limitations; and it may be refused, in the discretion of the court, although less time has elapsed.¹ So, where it will work hardship or injustice; or will not accomplish any useful purpose; or the applicant has assented to the act complained of; or his conduct has been inequitable; the writ will not be granted.² And a mandamus will not be granted, unless the applicant has a clear legal right, and the officer is subject to a clear legal duty; so that, if either appears to be doubtful, the court will refuse the writ, or discharge it if it has been issued.³ But a mandamus will be granted to compel a county treasurer to pay a bill audited by the supervisors, although it appears that there were defects and irregularities in the proceedings, whereby the demand was created.⁴

Davis v Co. Com'rs, 63 Me. 396;
State v Kirkley, 29 Md. 85, at p. 109
Brooke v Widdicombe, 30 Md. 386;
Oakes v Hill, 8 Pick. (Mass.) 47;
Sherburne v Horn, 45 Mich. 160;
Lamphere v Grand Lodge, 47 Mich. 429;
St. Stephen Church Cases, 25 Abb.
 N. C. (N. Y.) 242;
Ex parte Fleming, 4 Hill (N. Y.) 581;
People v Chapin, 104 N. Y. 96;
Comm. v Co. Com'rs, 1 Whart. (Pa.) 1;
Comm. v Co. Com'rs, 16 S. & R. (Pa.)
 31;
Free Press Ass'n v Nichols, 45 Vt. 7.

¹ *People v Chapin*, 104 N. Y. 96;
State v Appleby, 25 S. C. 100.
 See also, *Coffey v Grand Council*, 87
 Cala. 367.

² *Chesebro v Babcock*, 59 Conn. 213
Swigert v Hamilton Co., 130 Ill. 538;
State v Co. Com'rs, 26 Kan. 419;
Oakes v Hill, 8 Pick. (Mass.) 47;
Hale v Risley, 69 Mich. 596.

³ *Williams v Smith*, 6 Cala. 91;

Chesebro v Babcock, 59 Conn. 213;
State v Craft, 17 Fla. 722;
People v Forquer, 1 Ill. 104;
People v Oldtown, 88 Ill. 202;
Chicago, etc., R. R. Comp'y v Suffern,
 129 Ill. 274;
Brokaw v Com'rs, 130 Ill. 482;
Swigert v Hamilton Co., 130 Ill. 538;
Hall v Stewart, 23 Kan. 396;
Townes v Nichols, 73 Me. 515;
People v Miller, 43 Hun (N. Y.) 463;
People v N. Y. Infant Asylum, 122
 N. Y. 190;
People v MacLean, 25 Abb. N. C. (N. Y.)
 470;
St. Stephen Church Cases, 25 Abb.
 N. C. (N. Y.) 242;
Hughes v Co. Com'rs, 107 N. C. 598;
Easton v Lehigh Water Comp'y, 97
 Pa. St. 554;
Free Press Ass'n v Nichols, 45 Vt. 7.
 See also, *High Extr. Rem.*, 2d ed., § 9
 and numerous cases there cited; and
 the postscript to ch. 9, p. 172, *ante*.
⁴ *People v Dickinson*, 57 Hun (N. Y.) 312.

§ 816. **Doctrine as to the relator's interest.**—A private person, who applies for the writ, must show affirmatively that he has a special interest, not possessed by citizens generally, in the performance of a duty specially imposed upon the officer, against whom the writ is asked.¹ But it has been held, that a citizen and tax payer has a right, by virtue of his interest in the order and maintenance of the government, and the enforcement of the law, to have a mandamus, to compel the common council of a city to consider and act upon the estimate of the mayor, of the expenses of executing the civil service law; and that it is only when some personal or private redress is sought, that the relator must be personally interested.² But the authorities are not harmonious, respecting the right of a private citizen, in the absence of a statute conferring upon him the power, or of any interest, apart from his general interest in the due administration of the laws, to interfere by mandamus to compel official action; some of them, like the case just cited, incline to give him an extensive power in that respect;³ while others deny to

¹ *Ottawa v People*, 48 Ill. 233;
Chance v Temple, 1 Iowa 179;
State v County Judge, 2 Iowa 280;
Moon v Cort, 43 Iowa 503;
Bobbett v State, 10 Kan. 9;
Sanger v Co. Com'rs, 25 Me. 291;
People v Inspectors, etc., 4 Mich. 187;
People v Regents, etc., 4 Mich. 98;
People v Halsey, 37 N. Y. 344;
State v Co. Com'rs, 5 Ohio St. 497;
State v Henderson, 38 Ohio St. 644, at
 p. 648;
Heffner v Comm., 28 Pa. St. 108;
State v Haben, 22 Wis. 660.

² *People v Com. Council*, 16 Abb. N. C.
 (N. Y.) 96.

³ *Moses v Kearney*, 31 Ark. 261;
State v Co. Com'rs, 17 Fla. 707;

Ottawa v People, 48 Ill. 233;
Hall v People, 57 Ill. 307;
Glencoe v People, 78 Ill. 382;
Hamilton v State, 3 Ind. 452;
State v Co. Judge, 7 Iowa 186;
Pumphrey v Mayor, etc., 47 Md. 145;
State v Francis, 95 Mo. 44;
State v Gracey, 11 Neva. 223;
State v Rahway, 33 N. J. L. 110;
People v Collins, 19 Wend. (N. Y.) 56;
People v Supervisors, 11 Hun (N. Y.)
 306; modified on other points, 73 N. Y.
 173;
People v Sup'rs, 17 Hun (N. Y.) 501, at
 p. 505;
People v Halsey, 37 N. Y. 344;
People v Sup'rs, 56 N. Y. 249;
Union Pacific R. R. Comp'y v Hall, 91
 U. S. 343.

him the right to interfere.¹ It has been said by the supreme court of the United States, and the court of appeals of Maryland, that the preponderance of authority is in favor of the former proposition.²

§ 817. **The same subject; where the attorney-general is the applicant.**—Where the application is made by the attorney-general, in a matter wherein the public is interested, the writ is granted of course; but it may be refused, even if the attorney-general applies for it, where no public right is to be protected or public interest to be secured; and the application is not properly made by him, where private interests only are involved.³

§ 818. **Doctrine as to other adequate remedy.**—A mandamus will not, in general, be granted, or, if granted, will be quashed at the hearing, where the party may have an adequate remedy by appeal, writ of error, certiorari, exceptions, motion, or other mode of review,⁴ or

¹ *Bobbett v State*, 10 Kan. 9;
Turner v Co. Com'rs, 10 Kan. 16;
Reedy v Eagle, 23 Kan. 254;
Adkins v Doolen, 23 Kan. 659;
Sanger v Co. Com'rs, 25 Me. 291;
Mitchell v Boardman, 79 Me. 469;
People v Regents, etc., 4 Mich. 98;
People v Inspectors, etc., 4 Mich. 187;
People v Sup'rs, 38 Mich. 421;
Smith v Saginaw, 81 Mich. 123;
State v Weld, 39 Minn. 426;
Heffner v Comm., 28 Pa. St. 108.
 See also, *post*, §§ 851, 852.

² Cases in 47 Md. and 91 U. S., *supra*.

³ *Att'y Gen'l v Lawrence*, 111 Mass. 90;
Att'y Gen'l v Boston, 123 Mass. 460;
People v Rome, etc., R. R. Comp'y, 103 N. Y. 95.

⁴ *Reg. v Registrar, etc.*, L. R., 21 Q. B. Div. 131; 57 L. J., Q. B., 433; 59 L. T., 67; 36 W. R. 695; 52 J. P. 710;
Ex parte Schmidt, 62 Ala. 252;
Ex parte South, etc., R. R. Comp'y, 65

Ala. 599;
Basham v Carroll, 44 Ark. 284;
Early v Mannix, 15 Cala. 149;
People v Hubbard, 22 Cala. 34;
People v McLane, 62 Cala. 616;
Hemphill v Collins, 117 Ill. 396;
Marshall v Sloan, 35 Iowa 445;
Meyer v Dubuque Co., 43 Iowa 592;
Barnett v School Directors, 73 Iowa 134;
State v Police Jury, 29 La. Ann. 146;
State v Judge, 36 La. Ann. 394;
People v Judge, etc., 29 Mich. 487;
Olson v Circuit Judge, 49 Mich. 85;
Third National Bank v Reilly, 81 Mich. 438;
Burt v Circuit Judge, 82 Mich. 251;
State v County Court, 68 Mo. 29;
State v Lubke, 85 Mo. 338;
State v Megown, 89 Mo. 156;
State v Buhler, 90 Mo. 560;
State v Babcock, 22 Nebr. 38;
State v Kinkaid, 23 Nebr. 641;
People v Lott, 42 Hun (N. Y.) 408;

by an action at law to recover damages.¹ But where a county treasurer holds funds belonging to the state, he may be compelled by mandamus to pay over the same, and the state is not confined to an action upon his bond.² So with respect to a tax collector.³ The rule is the same, with respect to the prevention of a mandamus by another remedy, where it is given by statute, as where it is given by the common law.⁴ But it has been held, that where a statute gives an action against supervisors, in a case where formerly the remedy was by mandamus, the mandamus is not taken away thereby, but either remedy may be pursued;⁵ and that the existence of a remedy in equity does not cut off a mandamus.⁶

McDaniel v King, 89 N. C. 29;

Moon v Wellford, 84 Va. 34;

State v Co. Court, 33 W. Va. 589;

State v Sup'rs, 29 Wis. 79.

But the want of any other adequate and specific remedy is not, of itself, sufficient to entitle the party to a mandamus. *People v Garnett*, 130 Ill. 340; *Ewing v Cohen*, 63 Tex. 482.

¹ *Ex parte Robins*, 7 Dowl. P. C. 566; 1 W. W. & H. 578; 3 Jur. 103;

Reg. v Ponsford, 1 D. & L. 116; 12 L. J., Q. B., 313; 7 Jur. 767;

American Asylum v Phoenix Bank, 4 Conn. 172;

Tobey v Hakes, 54 Conn. 274;

Calley v Webster, 59 Conn. 361;

People v Salomon, 46 Ill. 415;

Connersville v Connersville Hydraulic Comp'y, 86 Ind. 184;

Excelsior, etc., Ass'n v Riddle, 91 Ind. 84;

State v Dist. Judge, 42 La. Ann. 847;

Lexington v Mulliken, 7 Gray (Mass.) 280;

People v Town Auditors, 1 How. Pr. N. S. (N. Y.) 224;

People v Miller, 43 Hun (N. Y.) 463;

People v Sup'rs, 11 N. Y. 563;

People v Hawkins, 46 N. Y. 9;

People v Campbell, 72 N. Y. 496;

People v Thompson, 99 N. Y. 641;

King William Justices v Munday, 2 Leigh (Va.) 165;

High Extr. Rem., 2d ed., § 15, and numerous cases there cited. But see *Fremont v Crippen*, 10 Cala. 211;

Babcock v Goodrich, 47 Cala. 488;

State v Dougherty, 45 Mo. 294;

Mobile, etc., R. R. Comp'y v Wisdom, 5 Heisk. (Tenn.) 125.

² *State v Staley*, 38 Ohio St. 259, at p. 264.

³ *State v Fyler*, 48 Conn. 145.

⁴ *High Extr. Rem.*, 2d ed., § 16, citing *Louisville, etc., R. R. Comp'y v State*, 25 Ind. 177;

Fogle v Gregg, 26 Ind. 345;

Marshall v Sloan, 35 Iowa 445;

State v Co. Com'rs, 46 Md. 621;

Ex parte Mackey, 15 S. C. 322, at p. 333;

King William Justices v Munday, 2 Leigh (Va.) 165;

State v Sup'rs, 29 Wis. 79.

⁵ *Thomas v Sup'rs*, 115 N. Y. 47, aff'g 45 Hun (N. Y.) 588.

⁶ *Eby v School Trustees*, 87 Cala. 166;

People v State Treasurer, 24 Mich. 468.

See, however, *contra, semble*, *American Asylum v Phoenix Bank*, 4 Conn. 172;

People v Salomon, 46 Ill. 415,

§ 819. **The same subject.**—In order to defeat a mandamus, on the ground that there is another remedy, it must clearly appear, that the latter is competent to afford the party the full relief, which he might obtain by mandamus; and, if it is doubtful whether such is the case, the mandamus will lie.¹ And it is no objection to granting a mandamus, that an indictment will lie for the act or omission, of which complaint is made.²

§ 820. **Doctrine where writ issues against a judicial officer.**—Where the function, which is to be performed by the officer, against whom the mandamus is to issue, is of a judicial or *quasi* judicial character, the mandamus will lie, only where he fails to perform the duty enjoined upon him; or, in other words, a mandamus will be granted to compel him to act, where he neglects or refuses to act. Thus, a mandamus will lie against a board of supervisors or other auditing officers, to compel them to audit the account of the relator, where they refuse so to do.³ And in all other cases, where an officer, a court, or other tribunal, charged with the performance of a judicial or *quasi*

¹ *Etheridge v Hall*, 7 Port. (Ala.) 47;
Fremont v Crippen, 10 Cal. 211;
Babcock v Goodrich, 47 Cal. 488;
People v Auditors, 42 Mich. 422;
People v Mayor, etc., 10 Wend. (N. Y.) 395;

In re Williamsburgh, 1 Barb. (N. Y.) 34;

Overseers v Overseers, 82 Pa. St. 275.

² *Rex v Severn, etc.*, Ry. Comp'y, 2 B. & Ald. 646;

Reg. v Bristol Dock Com'y, 1 G. & D. 286; 2 Q. B., (Ad. & El., N. S.) 64; 2 Rallw. Cas. 599; 6 Jur. 216;

Ex parte Robins, 7 Dowl. P. C. 566; 1 W. W. & H. 578; 3 Jur. 103;

Reg. v Eastern Counties Ry. Comp'y, 10 Ad. & El. 531; 2 P. & D. 648; 1 Rallw. Cas. 509;

Fremont v Crippen, 10 Cal. 211;

In re Trenton W. P. Comp'y, 20 N. J. L. 659;

People v Mayor, etc., 10 Wend. (N. Y.) 395.

But, in an ecclesiastical case, it was held, that a mandamus would not be granted, because a suit in equity or *quare impedit* would lie. *Reg. v Trustees of Orton Vicarage*, 14 Q. B. (Ad. & El., N. S.) 139; 18 L. J., Q. B. 321; 13 Jur. 1,049.

It has been held in Illinois, that where an indictment would accomplish the object, to attain which the mandamus is asked, the mandamus will not be granted. *Brokaw v Highway Com'rs*, 130 Ill. 482, explaining *Com'rs v People*, 66 Ill. 339.

³ *People v Supervisors*, 53 Hun (N. Y.) 254.

judicial duty, fails to act upon the matter thus committed to his or its charge, he or it may be compelled by mandamus to take such action; but not to act in a particular way, as that would be tantamount to substituting the judgment of the court granting the mandamus, in place of the judgment of the officer or other tribunal, to whose judgment the law has committed the decision of the matter.¹ Thus, the New York court of appeals, denying a mandamus, to compel a board of town auditors to allow an account against the town, which had been rejected by a former board, said: "In determining whether the town was liable for these claims, the board acted judicially, and such action cannot be reviewed or controlled by courts through the writ of mandamus, which is an appropriate remedy to compel public officers, judicial as well as ministerial, to act; and when the act is ministerial, the officer may be compelled to perform the act according to law; but officers vested with judicial power, which is to be exercised upon a disputed state of facts, or upon facts from which different inferences may be drawn, cannot be compelled by mandamus to decide in a particular way."² Upon the same principle, an officer or other tribunal, exercising judicial or *quasi* judicial power, cannot be compelled by mandamus to reverse a decision upon

¹ *State v Williams*, 69 Ala. 311;
People v Barnes, 66 Cala. 594;
People v Dist. Ct., 14 Colo. 396;
Union Colony v Elliott, 5 Colo. 371;
State v Co. Com'rs, 22 Fla. 29;
State v Thrasher, 77 Ga. 671;
People v Anthony, 25 Ill. App. 532;
Glencoe v People, 78 Ill. 332;
People v Garnett, 130 Ill. 340;
Case v Blood, 71 Iowa 632;
Eden v Templeton, 72 Iowa 687;
Comm. v Co. Court, 82 Ky. 632;
State v Dubuclet, 28 La. Ann. 698;
State v Dist. Judge, 32 La. Ann. 1,305;
State v Rightor, 32 La. Ann. 1,305;
State v Judge, 34 La. Ann. 1,177;

State v St. Louis Court, 87 Mo. 374;
People v Gilon, 24 Abb. N. C. (N. Y.)
 125;
Howland v Eldredge, 43 N. Y. 457;
People v Com. Council, 78 N. Y. 33;
People v Schiellain, 95 N. Y. 124;
People v Chapin, 104 N. Y. 96;
People v Meakim, 56 Hun (N. Y.) 626;
Comm. v McLaughlin, 120 Pa. St. 518;
Weeden v Town Council, 9 R. I. 128;
Meadows v Nesbit, 12 Lea (Tenn.) 486;
State v County Court, 33 W. Va. 589.
 See also, *ante*, § 814.

² *People v Barnes*, 114 N. Y. 317, see
 pp. 330, 331.

the matter, already made, although such decision was erroneous.¹ Thus, where commissioners of highways had refused a petition to ascertain and record an old road, a mandamus was refused, as not being the proper remedy, which was by proceedings to review their action.² But if the decision has been reversed, upon review by a higher court, and there is no other remedy to enforce action, in accordance with the decision upon the review, a mandamus will lie to compel such obedience.³ Thus, a mandamus lies against an equity judge, for wrongfully refusing to make an order, requiring the restitution of money, paid under a decree which has been reversed.⁴

§ 821. **Will specify mode of performance of ministerial act.**—But where the application for the writ is made, on the ground that the officer has failed to perform a ministerial act, which it was his duty to perform, the mandamus may direct the performance of the particular act, and specify the mode of performance, so as to conform to the law, and the right of the party, as determined by the court.⁵ And where the board of supervisors of a county reduced the amount of a claim against the county, in a

¹ *Davidson v Washburn*, 56 Ala. 596;
Hempstead Co. v Grave, 44 Ark. 317;
Scott v Super. Ct., 75 Cal. 114;
Scheerer v Edgar, 76 Cal. 569;
People v Garnett, 130 Ill. 340;
People v Judge, 41 Mich. 5;
Detroit, etc., R. R. Comp'y v Newton,
 61 Mich. 33;
Myers v Chalmers, 60 Miss. 772;
State v Young, 84 Mo. 90;
In re Abrams, 45 Hun (N. Y.) 272;
People v Saratoga Springs, 54 Hun
 (N. Y.) 16;
People v Sup'rs, 14 Abb. N. C. (N. Y.) 29;
People v Chapin, 103 N. Y. 635;
People v Chapin, 104 N. Y. 96;
In re Newlin, 123 Pa. St. 541;
Ex parte Flippin, 94 U. S. 348;
Ex parte Loring, 94 U. S. 418;

Ex parte Perry, 102 U. S. 183;
United States v Black, 128 U. S. 40.

² *People v Hulse*, 38 Hun (N. Y.) 388.

³ *United States v Black*, 128 U. S. 40;
S. P., Falk v Strother, 84 Cal. 544.

⁴ *Ex parte Walter Bro's*, 89 Ala. 237.

Shortton Informations, etc., 1st Amer.
 ed. 256, 257, and cases cited;
Humboldt v Co. Com'rs, 6 Neva. 30;
State v Edwards, 51 N. J. L. 479;
People v Barnes, 114 N. Y. 317, per
 Potter, J., p. 331;
People v Baker, 14 Abb. Pr. (N. Y.) 19,
 per Bockes, J., p. 28.
People v County Judge, 13 How. Pr.
 (N. Y.) 277; and numerous other
 cases.

case where there was no dispute about the facts, and the rule of compensation was fixed by law; a mandamus was granted, to compel them to audit and pay the claim, as presented; the court holding, that in such a case the board merely represented the debtor, and had no *quasi* judicial power.¹ So, where a city board fixed the salaries of certain officers, at a smaller sum than the statute required, a mandamus was granted, to compel the board to fix the salaries at the lawful rate.² So, a mandamus was granted, to compel the clerk of the quarter sessions, to file and record resolutions of the school directors of a city, the court refusing to entertain the objection, that the statute, which made it his duty so to do, was unconstitutional.³ And it has been held, that the validity of the passage of a municipal ordinance, where it is apparently regular, cannot be tested upon a mandamus, to require the proper officer to certify to the passage thereof.⁴

§ 822. **Cannot issue to control discretion.**—Upon the same principle, as that which forbids the courts to control by mandamus the exercise of judicial or *quasi* judicial power, rests the rule, that a mandamus will not be granted, where the matter in question is left by the law to be determined, according to the discretion of the officer or other tribunal, against whom or which the mandamus is asked; for the court has no power to substitute its own judgment or discretion, in place of that of the officer or body, to whose judgment or discretion the matter has been referred by the law.⁵ This rule applies also to the

¹ *People v Sup'rs*, 56 Hun (N. Y.) 459.

² *Dolan v Brooklyn*, 55 Hun (N. Y.) 448.

³ *Comm. v James*, 135 Pa. St. 480.

⁴ *Comm. v Fitler*, 136 Pa. St. 129.

⁵ *Ex parte Gresham*, 82 Ala. 359;
McCreary v Rogers, 35 Ark. 298;
Willard v Super. Ct., 82 Cal. 456;
United States v Boutwell, 3 Mac Ar-
 thur (D. C.) 172;

United States v Key, 3 McArthur
 (D. C.) 337;

State v Thrasher, 77 Ga. 671;

People v Dulaney, 96 Ill. 503;

People v Knickerbocker, 114 Ill. 539;

Holliday v Henderson, 67 Ind. 108;

State v Co. Com'rs, 125 Ind. 247.

Stanley v Monnet, 34 Kan. 702;

Comm. v County Ct., 82 Ky. 632;

State v Judge, 40 La. Ann. 852;

writ of certiorari, and the adjudications thereupon with respect to the certiorari, are equally applicable here.¹ But it has been held, that a mandamus will lie, where a discretionary power has been so abused, that injustice will result from the act complained of.² A similar exception to the rule, that an injunction will not be granted to control the exercise of a discretionary power, will be noticed in its proper place.³

§ 823. **Nor to compel an unlawful act; nor an impracticable act.**—A mandamus will not be granted, or, if it has been granted, will be quashed, where the officer cannot lawfully perform the act which he is thereby commanded to perform, as where he is prohibited by statute from doing it;⁴ or where he has been enjoined by a court

State v Read, 41 La. Ann. 73;
Davis v Co. Com'rs, 63 Me. 396;
Shober v Cochrane, 53 Md. 544;
Deehan v Johnson, 141 Mass. 23;
Mayo v Co. Com'rs, 141 Mass. 74;
People v Auditor Gen'l, 36 Mich. 271;
People v Judge, 36 Mich. 274;
People v Circuit Judge, 38 Mich. 244;
Perrine v Hamlin, 48 Mich. 641;
Wolfson v Rubicon, 63 Mich. 49;
Brown Co. v Winona Land Comp'y, 38 Minn. 397.

State v Somerset, 44 Minn. 549;
Swan v Gray, 44 Miss. 393;
State v Young, 84 Mo. 90;
State v Megown, 89 Mo. 156;
State v Scott, 18 Nebr. 597;
State v Edwards, 51 N. J. L. 479;
People v French, 24 Hun (N. Y.) 263;
People v Sup'rs, 24 Hun (N. Y.) 413;
People v Fairchild, 67 N. Y. 334;
Com'rs v Co. Com'rs, 107 N. C. 335;
Virginia v Rives, 100 U. S. 313;
Ex parte Railway Comp'y, 101 U. S. 711;
 And *ante*, § 394.
Accord, Co. Com'rs v Crotty, 9 Colo. 318;
Freeman v Selectmen, 34 Conn. 406;
Seymour v Ely, 37 Conn. 103;

State v Judge, etc., 41 La. Ann. 951;
State v Judges, 41 La. Ann. 1,012;
Post v Sparta, 63 Mich. 323;
People v Martin, 32 N. Y. St. Rep. 440;
 11 N. Y. Supp. 123;
People v Grant, 58 Hun (N. Y.) 455;
People v Leonard, 74 N. Y. 443;
Collarn's Petition, 134 Pa. St. 551;
United States v Seaman, 17 How. (U. S.) 225;
United States v Com'r Gen'l Land Office, 5 Wall. (U. S.) 563;
Secretary v McGarrahan, 9 Wall. (U. S.) 298;
State v Co. Court, 33 W. Va. 589; and many other authorities.

¹ *Ante*, § 810.

² *Brokaw v Com'rs Highways*, 130 Ill. 482. See also, *Glencoe v People*, 78 Ill. 382, at p. 389.

³ *Post*, § 849.

⁴ *State v Sneed*, 9 Baxt. (Tenn.) 472. See also, *Page v Sup'rs*, 85 Cala. 50; *People v Hyde Park*, 117 Ill. 462; *Ross v Lane*, 11 Miss. 695; *People v Fowler*, 55 N. Y. 252; *Johnson v Lucas*, 11 Humph. (Tenn.) 306.

of competent jurisdiction from doing it.' The same rule applies, where he has not the power to perform the act,² although he has wrongfully put it out of his power to perform the same.³ And it seems, that the want of power, which excuses the performance, is not necessarily the want of lawful power, but may include inability to devote to the business the time and attention required for performance. Thus, in the supreme court of New York, where a justice of the marine court declined to entertain an application for the removal of a tenant by summary proceedings, under a statute which provided, that upon such an application, the officer "must" issue the precept, on the ground that all his time was required to enable him to attend to the business of his court, and there were other officers who had jurisdiction to entertain the proceedings; it was held, upon the appeal, that the court below "very wisely exercised" its discretion in refusing to grant the writ.' And a mandamus will not lie, where the relator's right and the officer's power have come to an end.⁵

§ 824. **The same subject.**—So, a mandamus will not lie, to compel a public financial officer to pay a demand, where no appropriation has been made therefor;⁶ or

¹ *Ex parte Fleming*, 4 Hill (N. Y.) 581;
People v Supervisors, 30 Hun (N. Y.)
 146;
Ohio, etc., R. R. Comp'y v Co. Com'rs,
 7 Ohio St. 278;
 See, however, *Roberts v Davidson*, 83
 Ky. 279.

² *People v O'Keefe*, 100 N. Y. 572.
 See also, *Highway Com'rs v People*,
 19 Ill. App. 253;
State v Vanarsdale, 42 N. J. L. 536;
Bates v Porter, 74 Cal. 224;
Ackerman v Desha Co., 27 Ark. 457.

³ *Rice v Walker*, 44 Iowa 458;
People v Wendell, 57 Hun (N. Y.) 362;
Contra, Regina v Birmingham, etc.,

R. Comp'y, 2 Q. B. (Ad. & Ell. N. S.) 47.

⁴ *People v McAdam*, 28 Hun (N. Y.) 284;
 appeal dismissed, 91 N. Y. 655.
 See also, *Att'y Gen'l v Boston*, 123
 Mass. 460;
Alger v Seaver, 138 Mass. 331.

⁵ *State v Archibald*, 43 Minn. 328.

⁶ *Reeside v Walker*, 11 How. (U. S.) 272;
 See also, *State v Jumel*, 31 La. Ann.
 142;
Weston v Dane, 51 Me. 461,
State v Bishop, 42 Mo. 504;
Kentucky v Boutwell, 13 Wall. (U. S.)
 528;
United States v Bayard, 127 U. S. 251.

where a lawful and regular warrant or other voucher therefor has not been made.¹

§ 825. **Nor to determine the title to an office.**—Mandamus will not lie to determine, either directly or indirectly, a disputed question of title to a public office. The rule in this respect was stated in the New York court of appeals, where the question arose upon an application for a mandamus, to enjoin and restrain the defendants from exercising the offices of trustee and president of a village. The court affirmed an order, dismissing the application and quashing the writ. Andrews, J., delivering the opinion of the court, said: "The awarding of a mandamus is, in general, discretionary. There may be cases, where the party is legally entitled to have the writ issued, and where a denial of the right would be reviewable in this court. But this is not a case of that character. It is not the proper office of a writ of mandamus, to restrain a party, claiming to be a public officer, from exercising his office, or to enjoin one, claiming to have been elected or appointed to an office, from qualifying. 'Mandamus is always to do some act in execution of law, and not to be in the nature of a writ *de non molestando*.' Vin. Abr., tit. Man. A; 2 Salk. 572. The statute gives a remedy in the nature of a quo warranto for an unlawful intrusion into a public office, and the right of the defendants . . . may be tested in a suit brought for that purpose."² Numerous cases have settled, by a great preponderance of authorities, the rule, that where an office is filled by an incumbent, exercising the functions thereof, and claiming title thereto, another person claiming title cannot have a mandamus, to eject him and put himself in possession; his remedy is by an information

¹ People v Fogg, 11 Cal. 351;
Honea v Monroe Co., 63 Miss. 171;
See also, People v Co. Treasurer, 36

Mich. 416.
People v Ferris, 76 N. Y. 326, aff'g 16
Hun (N. Y.) 219.

in the nature of a quo warranto, or a statutory substitute for such a proceeding, where such a substitute is provided.¹

§ 826. **The same subject.**—Nor can a mandamus be used to accomplish the same result indirectly. Thus the claimant to an office, in possession of another, cannot maintain mandamus, to enforce the payment to him of the salary appurtenant to the office.² Nor will mandamus lie to a board of officers, ex. gr., a board of supervisors, to command them to admit the relator as a member, where his title is in controversy, and he is not in possession;³ or where the answer shows that he is not qualified.⁴

§ 827. **The same subject; conflicting authorities.**—But the authorities are not in perfect harmony upon this question, for some of them recognize a mandamus, as a proper method of settling a disputed question of title to an office. Thus, in Massachusetts, a mandamus was

¹ *Rex v Mayor of Colchester*, 2 T. R. (D. & E.) 259;

Rex v Mayor of Oxford, 6 Ad. & Ell. 349; 1 Nev. & P. 474;

Rex v Mayor of Winchester, 7 Ad. & Ell. 215; 2 Nev. & P. 274;

Reg. v Councillors of Derby, 7 Ad. & Ell. 419; 2 Nev. & P. 589; W. W. & D. 671;

Frost v Mayor of Chester, 5 Ell. & Bl. 531; s. c., *sub nom.*, *Reg. v Mayor*, etc., 25 L. J., Q. B. 61; 2 Jur. N. S. 114;

² *State v Dunn, Minor* (Ala.) 46;

Ex parte Harris, 52 Ala. 87;

³ *Underwood v Wylie*, 5 Ark. 248;

Meredith v Sup'rs, 50 Cala. 433;

Kelly v Edwards, 69 Cala. 460;

Duane v McDonald, 41 Conn. 517;

Harrison v Simonds, 44 Conn. 318;

Bonner v State, 7 Ga. 473;

People v Forquer, 1 Ill. 104;

Hildreth v Heath, 1 Ill. App. 82;

People v Head, 25 Ill. 325;

State v Johnson, 29 La. Ann. 399;

French v Cowan, 79 Me. 426;

People v Detroit, 18 Mich. 338;

Frey v Michie, 68 Mich. 323;

County Court v Sparks, 10 Mo. 117;

State v Thompson, 36 Mo. 70;

State v Rodman, 43 Mo. 256;

Anderson v Colson, 1 Nebr. 172;

State v Palmer, 10 Nebr. 203;

Denver v Hobart, 10 Neva. 28;

People v Mayor, etc., 3 Johns. Cas. (N. Y.) 79;

People v Stevens, 5 Hill (N. Y.) 616;

People v Sup'rs, 12 Barb. (N. Y.) 217;

People v Lane, 55 N. Y. 217;

In re Gardner, 68 N. Y. 467;

Brown v Turner, 70 N. C. 93;

Swain v McRae, 80 N. C. 111;

Ellison v Raleigh, 89 N. C. 125.

² *State v John*, 81 Mo. 13.

³ *Frey v Michie*, 68 Mich. 323.

See also, *French v Cowan*, 79 Me. 423.

People v Sheffield, 47 Hun (N. Y.) 481.

Accord, Pucket v Bean, 11 Heisk. (Tenn.) 600.

granted, to compel the members of a school committee to recognize the relator as one of their number, although they had already recognized another person.¹ And the courts of Maryland and Virginia, seem to recognize a mandamus, as a proper remedy, in favor of the claimant of an office against the person in possession, to oust the respondent, and put the relator in possession.²

§ 828. **When the writ lies to enforce the claims of an officer de jure.**—But an issue upon the eligibility of a person to hold an office, of which he is in possession, cannot be raised upon a mandamus, to compel payment of his salary.³ And the cases agree, that where there is no other person in possession, the relator may be put by mandamus into possession of an office, to which he is rightfully entitled. Thus mandamus lies to restore an officer, who has been illegally suspended;⁴ or to induct a person into an office, to which he has been lawfully chosen, there being no adverse claimant;⁵ or to put into possession one, in whose favor a final judgment, declaring him to be entitled to the office, has been rendered upon information in the nature of a quo warranto, or other proceedings to test his title;⁶ or to compel a person, chosen to a municipal office, to accept it and to qualify;⁷ or in favor

¹ *Conlin v Aldrich*, 98 Mass. 557.
See, however, *In re Strong*, 20 Pick.
(Mass.) 484;
Att'y Gen'l v Simonds, 111 Mass. 256.

² *Harwood v Marshall*, 9 Md. 83;
Dew v Judges, etc., 3 Hen. & Munf.
(Va.) 1.

³ *Turner v Melony*, 13 Cala. 621.

⁴ *Metsker v Neally*, 41 Kan. 122, citing
Rex v Barker, 3 Burr. 1266;
Ex parte Wiley, 54 Ala. 226;
Fuller v Trustees, 6 Conn. 532;
Howard v Gage, 6 Mass. 462;
County Court v Sparks, 10 Mo. 117;
State sey City, 25 N. J. L. 536;

Comm. v Guardians, etc., 6 S. & R.
(Pa.) 469;

Milliken v City Council, 54 Tex. 388;
State v Com. Council, 9 Wis. 254.
See also, *Delahanty v Warner*, 75 Ill.
185;

In re Strong, 20 Pick. (Mass.) 484;
State v Dusman, 39 N. J. L. 677;
In re Gleese, 50 N. Y. Super. Ct. 473; 67
How. Pr. (N. Y.) 372.

⁵ *State v Miller*, 45 N. J. L. 251.

⁶ *Mannix v State*, 115 Ind. 245;
Prince v Skillin, 71 Me. 361;
State v Atlantic City, 52 N. J. L. 332.

⁷ *Ante*, § 166

of the person in possession of an office, against a claimant, who wrongfully takes the tax duplicate from the county treasurer in possession.¹

§ 829. **Practice, proceedings, etc.; references elsewhere.**—The principles, upon which the relief by mandamus rests, have been, it is believed, stated and illustrated sufficiently for the purposes of this work, in the foregoing pages. Numerous cases, arising upon mandamus, which have been cited in former chapters, are referred to in the note.² An examination of the practice and proceedings upon mandamus, and a complete collection of the cases in which the writ will lie, would be foreign to our plan. They belong properly to works, specially treating of this and other extraordinary remedies. But a few additional cases, possessing special features, where the office of the writ was illustrated, will be inserted.

§ 830. **Doctrine of mandamus in tax cases.**—Mandamus is the proper remedy, to compel the assessors of a city to correct an error, by including the relator's land in a district, subject to an assessment for a local improvement, although the assessment has been confirmed by the common council, and the statute declares such a confirmation to be final and conclusive; and this, although the warrant has been delivered to the collector, provided he has also been made a party.³ It also lies, against the register of arrears of taxes, to compel him to receive the balance of the tax chargeable against the relator's land, and to cancel the sale of such land; where the relator seasonably applied for information as to the amount of the tax, and paid the sum which was stated to him as being the amount thereof; but in fact, it was a larger sum; and in such a case, the purchaser is not a

¹ *Runion v Latimer*, 6 S. C. 126.

See also, *ante*, § 787.

392, 394, 411, 412, 442, 451, 457, 458, 509.

510, 539, 641, 644, 666, 687.

² *Ante*, §§ 96, 98, 138, 148, 155-157, 166, 359, ³ *People v Wilson*, 119 N. Y. 515.

necessary party.¹ It also lies against a town, to compel it to raise by taxation, its share of the money required for the support of a "joint free high school."

§ 831. **Against tribunal refusing to act; against officer refusing to certify.**—Mandamus lies against a tribunal, empowered to decide the relator's controversy, where it dismisses such controversy, upon the ground of want of jurisdiction.² A teacher in the public schools of a city, who, under the statute, cannot obtain payment of her salary, unless the principal of the school prepares the pay roll, and the school trustees certify to the correctness thereof, may have a mandamus against those officers, to compel them to perform such duties; in such a case, the rule that a mandamus will not lie, where there is a remedy at law, does not apply, and the court will compel the performance of the legal duties, which are indispensable preliminaries to the payment.³

§ 832. **That the act is burdensome on the defendant is no defence.**—It is not a ground for denying a mandamus against a public officer of a city, to compel him to remove a nuisance in the street, "that there are thousands of such nuisances, which would require an army of employees, and put the city to a heavy expense to remove;" and that the relator has a remedy against the individual creating the nuisance; unless it appears, that by reason of the numerous applications made in similar cases, the respondent is without men or money to obey the directions of the court.⁴

¹ *People v Registrar of Arrears*, 114 N. Y. 19, citing *Clementi v Jackson*, 92 N. Y. 591; *People v Cady*, 51 N. Y. Super. Ct. 316, . aff'd 99 N. Y. 620.

² *Joint F. H. School Dist. v Green Grove*, 77 Wis. 532.

³ *Temple v Super. Court*, 70 Cal. 211; *People v Swift*, 59 Mich. 529.

⁴ *In re Gleese*, 50 N. Y. Super. Ct. 473; 67 How. Pr. (N. Y.) 372.

⁵ *People v Newton*, 20 Abb. N. C. (N. Y.) 387.

§ 833. **Will not lie to enforce a private right; other cases.**—A mandamus will not be granted to compel performance of a private right, as distinguished from a public duty;¹ such as compliance with the terms of a contract, although it was made officially.² It will not be granted against a recording officer, and a purchaser at a tax sale, to compel the former to cancel of record a tax deed; nor against the recording officer only, to compel the cancellation of a mortgage; because in each case the application presents issuable facts, to be determined in an ordinary judicial proceeding.³ Nor will it be granted upon the application of members of the board of aldermen of a city, against the marshal of the city, to compel him to obey an order of the board, which the mayor, his official chief, refuses to recognize. The proper remedy in such a case is to remove the disobedient officer; and even if the statute requires the mayor's concurrence, in order to effect the removal, still that is the remedy provided by law, and the courts will not interfere by mandamus, on the ground that the mayor will probably refuse to concur with an order for the marshal's removal.⁴

§ 834. **The same; will not lie against deputy; when officer represents the public.**—A mandamus regularly lies only against a court or a public officer; and therefore it will not lie against an executor, to compel him to perform his statutory duty, because he holds only a private trust.⁵ And regularly it should not be directed to a deputy or other subordinate, to compel him to do an act in the

¹ Shortt on Informations, etc., 1st. Am. ed., 231;
Parrott v Bridgeport, 44 Conn. 180;
Tobey v Hakes, 54 Conn. 274;
State v Howard Co., 39 Mo. 375.

² Board of Education v Runnels, 57 Mich. 46;
State v Zanesville T. Comp'y, 6 Ohio St. 308.

See also, High Extr. Rem., 2d ed. § 25, citing *Rex v Wheeler*, Lee's Cas. temp. Hardwicke, 99.

³ *State v Batt*, 40 La. Ann. 582;
People v Miller, 43 Hun (N. Y.) 463.

⁴ *Alger v Seaver*, 138 Mass. 331.

⁵ *State v Tolle*, 71 Mo. 645.

name and in behalf of his principal, but to the principal.¹ A mandamus, directed to the clerk of a township, or other officer of a municipality, to compel performance of a continuing duty, not relating to the particular incumbent of the office, runs substantially against the municipality, and does not abate by the cessation of the incumbent's term of office.² So a change in the membership of a board of municipal officers, pending a mandamus against them, does not abate the proceeding.³ So it has been held, that where a mandamus is prayed for in the United States supreme court, by a state, against the governor of another state, to compel the performance of an act in behalf of his state, the mandamus in effect runs against the latter state, and the suit is one in which that court has original jurisdiction, and so may grant the mandamus.⁴

IV. *Prohibition.*

§ 835. **Its office and functions.**—The writ of prohibition, which we will next consider, partakes, within the very limited sphere to which it is confined, of the nature of an injunction. Its office and functions were well stated and defined by Gray, Ch. J., delivering the opinion of the supreme judicial court of Massachusetts, upon an application for the writ against county commissioners, to prohibit their action upon the proceedings of the manager of a railroad, owned by the Commonwealth, looking

¹ *Rex v Jeyes*, 3 Ad. & El. 416; 5 N. & M. 101; 1 H. & W. 325;

Rex v Payn, 6 Ad. & El. 392; 1 N. & P. 524; W. W. & D. 142; 1 Jur. 54.

See also, *Wigginton v Markley*, 52 Cal. 411.

So where he acts by direction or command of a superior, although not a deputy. *Alger v Seaver*, 138 Mass. 331.

² *Thompson v United States*, 103 U. S. 480.

Accord, People v Champion, 16 Johns. (N. Y.) 61;

People v Collins, 19 Wend. (N. Y.) 56.

³ *Doolittle v Branford Selectmen*, 59 Conn. 402.

⁴ *Kentucky v Dennison*, 24 How. (U. S.) 63. See also, *North Carolina v Temple*, 134 U. S. 22, cited *ante*, § 798.

to the appropriation of lands of the relator for a passenger station, under a statute authorizing such proceedings; which statute the relator insisted, and the court decided, was unconstitutional, because it made no sufficient provision for payment of the owner of the lands. The distinguished chief justice said: "A writ of prohibition, issuing from the highest court of common law, is the appropriate remedy to restrain a tribunal of peculiar, limited, or inferior jurisdiction, from taking judicial cognizance of a case not within its jurisdiction. . . . The fact, that the remedy by petition for a writ of certiorari, will be open to the landowner, after final judgment, affords no reason why the court should now refuse a writ of prohibition, and thereby put the petitioner to the trouble, expense, and delay of a trial before a tribunal, which has no jurisdiction of the case, and to whose jurisdiction the petitioner has objected at the outset of the proceedings. . . . The fact, that an agent of the commonwealth is the adverse party, in the proceedings before the county commissioners, affords no reason for refusing the writ. A writ of prohibition, like a writ of mandamus or of certiorari, is properly sued out in the name of the crown or the state; the only necessary defendant is the tribunal, whose proceedings are sought to be restrained, controlled, or quashed; and there is no class of cases, where the authority to issue writs of prohibition is better settled, than in those of courts martial, ecclesiastical courts, or inferior courts of common law, assuming to take cognizance, in excess of their jurisdiction, of criminal prosecutions." ¹ But the office of the

¹ Connecticut River R. R. Comp'y v County Com'rs, 127 Mass. 50, per Gray, Ch. J., citing 3 Bl. Com. 112; Searle v Williams, Hob. 288; Reg. v Herford, 3 El. & El. 115; Washburn v Phillips, 2 Met. (Mass.) 296; Gilbert v Hebard, 8 Met. (Mass.) 129; Vermont & Mass. R. R. Comp'y v Co.

Com'rs, 10 Cush. (Mass.) 12; Day v Springfield, 102 Mass. 310; Zylstra v Charleston, 1 Bay (S. C.) 382. Accord, Henshaw v Cotton, 127 Mass. 60; Chandler v R. R. Com'rs, 141 Mass. 208; State v St. Louis Court, 99 Mo. 216; People v Sup'rs, 121 N. Y. 345.

writ is not confined to a case, where the inferior tribunal is proceeding to adjudicate upon a matter of which it has no jurisdiction; it will also issue, to prevent the exercise of unauthorized power, in a case where the inferior tribunal has jurisdiction of the subject matter.¹ In other words, the writ is proper, where an inferior court either has no jurisdiction of the subject matter, or, having such jurisdiction, exceeds its authority in the proceedings relating thereto.² Thus, it has been held that prohibition lies, to prevent an inferior tribunal from proceeding further, after an appeal regularly taken to a superior tribunal;³ but, in another case, it was held, that where, after a regular appeal from an order, and a stay of the proceedings, the inferior court proceeded to enforce the order by punishment for contempt, the remedy was not by prohibition, but by appeal from the conviction for contempt, on the ground that the first appeal did not go to the jurisdiction.⁴

§ 836. **Writ lies in discretion; objection must have been taken in court below.**—The writ does not issue, of course, but only upon special direction of the court, which may grant or refuse it in the exercise of a sound discretion; but, as its discretion is subject to be reviewed by an appellate court, it is practically a writ of right, if the relator shows a case which entitles him to it.⁵ The

¹ *Coker v Super. Ct.*, 58 Cal. 177;
Murphy v Super. Ct., 58 Cal. 520;
Hayne v Just. Court, 82 Cal. 284;
Appo v People, 20 N. Y. 531.

² *Havemeyer v Superior Court*, 84 Cal. 327;

People v Petty, 32 Hun (N. Y.) 443. It has also been held that the writ lies where jurisdiction was obtained by fraud. *Bodley v Archibald*, 33 W. Va. 229.

For other definitions of the office and functions of the writ, substantially agreeing with those given in

the text, see *Ex parte Hamilton*, 51 Ala. 62;

Hudson v Super. Ct., 42 Mich. 239;
Roper v Cady, 4 Mo. App. 592;
Thomson v Tracy, 60 N. Y. 31;
Smith v Whitney, 116 U. S. 167.

³ *Fite v Black*, 85 Ga. 413.

⁴ *State v Young*, 44 Minn. 70.

⁵ *Havemeyer v Super. Ct.*, 84 Cal. 327;
Hudson v Super. Court, 42 Mich. 239,
 per Marston, J., pp. 243, 249;
Smith v Whitney, 116 U. S. 167, per
 Gray, J., p. 173.

attendant circumstances will be taken into consideration, in determining whether the writ shall be granted or refused, substantially as where an application is made for a certiorari or mandamus.¹ But it is necessary, that the applicant for the writ should show, that he seasonably objected to the jurisdiction in the proceedings below;² unless, perhaps, where the want of jurisdiction appears upon the face of the proceedings, in which case it has been said, that an objection to the jurisdiction is not required; and that the rule, requiring such an objection to be taken, applies, only where it arises upon matter *dehors* the record.³

§ 837. **Is founded upon want of jurisdiction.**—Want of jurisdiction in the inferior tribunal is the foundation, upon which the writ of prohibition rests, and it will not lie where the inferior tribunal has jurisdiction.⁴ Thus it has been said, that a prohibition ought not to issue, where the papers before the inferior tribunal present a case proper for its consideration; the remedy is to appear and defend; and that a prohibition will not lie, where the inferior tribunal has power to decide whether a jurisdictional fact exists, if there was any proof of the existence of the fact,

¹ *Ante*, §§ 803, 804, 815. For cases, where the court has exercised its discretion in granting or refusing a writ of prohibition, see

Ex parte Hamilton, 51 Ala. 82;
Russell v Jacoway, 33 Ark. 191;
Wreden v Super. Court, 55 Cal. 504;
Leonard v Bartels, 4 Colo. 95;
Arnold v Shields, 5 Dana (Ky.) 18;
State v Skinner, 32 La. Ann. 1,092;
State v Monroe, 33 La. Ann. 923;
Washburn v Phillips, 2 Met. (Mass.) 296;
Roper v Cady, 4 Mo. App. 592;
People v Seward, 7 Wend. (N. Y.) 518
Appo v People, 20 N. Y. 531,

² *Havemeyer v Super. Ct.*, 84 Cal. 37;

Hudson v Super. Ct., 42 Mich. 239;

State v Wilcox, 24 Minn. 143.

See also, *Ex parte McMeechen*, 12 Ark. 70;

Ex parte Little Rock, 26 Ark. 52;

State v Williams, 48 Ark. 227;

State v Steele, 38 La. Ann. 569;

State v Henry, 41 La. Ann. 908;

Conn. River R. R. Comp'y v Co. Com'rs, 127 Mass. 50, at p. 59.

³ *Havemeyer v Super. Ct.*, 84 Cal. 327.

⁴ *Sherlock v Jacksonville*, 17 Fla. 93;

Hart v Taylor, 61 Ga. 156.

See also, *Ex parte Greene*, 29 Ala. 52;

Ex parte Peterson, 33 Ala. 74;

Murphy v Super. Ct., 58 Cal. 520;

State v Judge, 42 La. Ann. 71.

although its decision was erroneous.¹ It is entirely foreign to the office of a writ of prohibition to set aside, correct, or modify a judgment, however erroneous, in a case within the jurisdiction of the inferior tribunal, with respect to the subject matter and the proceedings before it.² And it has been held, in some cases, that a prohibition is too late in any event, after its final judgment or other decision by the inferior tribunal.³

§ 838. **Doctrine where there is another remedy.**—

It has been held, that a writ of prohibition will not lie, where there is a remedy by appeal, writ of error, or other proceedings to review the decision of the inferior tribunal, or where the party applying for the writ has a remedy at law;⁴ but the contrary ruling has been made in other cases;⁵ and the latter opinion appears to accord more satisfactorily with the principles, regulating the office and functions of the writ, since the writ proceeds upon the ground of want of jurisdiction, and therefore, in most cases, there will be another remedy, if the proceedings below are allowed to end in a final judgment. But the

¹ *Murphy v Super. Ct.*, 84 Cal. 592.

See also, *People v McAdam*, 2 Browne Civ. Pro. Rep. (N. Y.) 52; 2 *McCarty* Civ. Pro. Rep. (N. Y.) 86; *People v Parker*, 63 How. Pr. (N. Y.) 3;

² *More v Super. Ct.*, 64 Cal. 345; *Bank Lick Turnpike Comp'y v Phelps*, 81 Ky. 613;

State v Judge, 34 La. Ann. 611; *State v Judge*, 34 La. Ann. 782;

State v Houston, 40 La. Ann. 393;

State v Burckhardt, 87 Mo. 533;

People v Letson, 3 How. Pr. N. S. (N. Y.) 381;

People v Surrogate's Court, 36 Hun (N. Y.) 218;

State v Columbia, 17 S. C. 80;

Ex parte Pennsylvania, 109 U. S. 174;

Shell v Cousins, 77 Va. 328.

³ *Hull v Super. Ct.*, 63 Cal. 179;

People v Dist. Court, 11 Colo. 574;

Hudson v Super. Ct., 42 Mich. 239;

People v Excise Com'rs, 61 How. Pr. (N. Y.) 514;

State v Stackhouse, 14 S. C. 417;

United States v Hoffman, 4 Wall. (U. S.) 153;

Haldeman v Davis, 28 W. Va. 324

Contra, Bodley v Archibald, 33 W. Va. 229.

⁴ *State v Monroe*, 33 La. Ann. 923;

State v Judge, 33 La. Ann. 1,284;

Ex parte Braudlacht, 2 Hill (N. Y.) 367.

Accord, Havemeyer v Super. Ct., 84 Cal. 327;

Murphy v Super. Ct., 84 Cal. 592.

⁵ *Connecticut River R. R. Comp'y v Co. Com'rs*, 127 Mass. 50, cited *ante*, § 835;

State v Wilcox, 24 Minn. 143.

cases agree, that the other remedy must be full and adequate to relieve the relator, in order to bar the writ.¹ The denial of a trial by a jury, in a prosecution for misdemeanor, is not, it has been held, a sufficient ground for issuing the writ, because the remedy by appeal will be effectual.²

§ 839. **Issues only to a court, or an officer exercising quasi judicial functions.**—The writ can issue only to an officer, tribunal, or body, exercising a judicial or *quasi* judicial power.³ And it does not lie to prevent the exercise of any power, not of a judicial nature,⁴ although requiring the exercise of judgment and discretion, such as fixing the rates which a waterworks company may charge for the use of its water;⁵ still less of any purely ministerial power;⁶ or of an executive or administrative power;⁷ or to prevent the usurpation of an office, that being the function of an information in the nature of a *quo warranto*.⁸

§ 840. **Prevents action under unconstitutional statute, or void judgment or order.**—Inasmuch as an unconstitutional statute is void, and cannot therefore confer jurisdiction upon a court, a judicial officer, or a *quasi* judicial officer, upon which or whom it purports to confer jurisdiction, prohibition is the proper remedy to prevent action by such a court or officer under such a stat-

¹ *Havemeyer v Super. Ct.*, 84 Cal. 327, and other cases cited in note 4, on p. 799.

² *Powelson v Lockwood*, 82 Cal. 613.

³ *People v Dist. Court*, 6 Colo. 534;
La Croix v Co. Com'rs, 50 Conn. 311;
Fleming v Election Com'rs, 81 W. Va. 608.

⁴ *Shortt on Informations, etc.*, 1st Am. ed. 439.

⁵ *Spring Valley Waterworks v Bartlett*, 63 Cal. 245.

⁶ *Hobart v Tillson*, 66 Cal. 210;
People v Supervisors, 1 Hill (N. Y.) 195;
Ex parte Braudlacht, 2 Hill (N. Y.) 367.

⁷ *People v Election Com'rs*, 54 Cal. 404;
People v Dist. Court, 6 Colo. 534;
Smith v Whitney, 116 U. S. 167;
Burch v Hardwicke, 23 Gratt. (Va.) 51.

⁸ *Buckner v Veuve*, 63 Cal. 304.

ute.¹ It has also been held, that prohibition lies to a court, which has rendered a personal judgment against a tax collector; in an action for money had and received, where he refused to accept from the plaintiff a tender of coupons for the plaintiffs' taxes, under a statute allowing payment in such coupons; whereupon the plaintiff paid the taxes under protest; and the collector paid the money into the treasury; this ruling proceeding upon the ground, that as the statute gave a special remedy in such a case, the court below had no jurisdiction, and the judgment was void.² But, in Alabama, it was held, that a prohibition would not lie, to prevent a judge from discharging a convict, without payment of the costs, by an illegal order, made before his sentence expired; such an order being regarded as a ministerial act, and therefore the subject of a mandamus.³

V. Injunction.

§ 841. **Is either a writ or an order; inquiry limited to public officers.**—An injunction, except in those states where law and equity proceedings have been merged by a code of civil procedure, is a writ issuing from a court of equity. Under the codes of civil procedure, it consists of an order; but the order is governed by the same rules and principles, which govern the writ of injunction. The general principles governing injunctions, and the mode of procedure thereupon, form the subject of several voluminous treatises, in England and in the United States, upon equity jurisprudence, equity jurisdiction, and equity procedure, and the consideration thereof is foreign to the purpose of this work. Our concern is merely with those principles, which relate to injunctions controlling the official action of public officers.

¹ *Ex parte Roundtree*, 51 Ala. 42;
Connecticut River R. R. Comp'y v Co.
Com'rs, 127 Mass. 50, cited *ante*, § 885.

² *Mallan v Bransford*, 86 Va. 675.

³ *Ex parte State*, 89 Ala. 177..

§ 842. **Rules governing the granting of the writ against a public officer.**—The rules, governing injunctions of this description, are thus stated in the leading American work upon equity jurisprudence: “The question has been made, how far a court of equity has jurisdiction to interfere, in cases of public functionaries, who are exercising special public trusts or functions. As to this, the established doctrine now is, that so long as those functionaries strictly confine themselves within the exercise of those duties which are confided to them by law, this court will not interfere. The court will not interfere to see whether any alteration or regulation, which they may direct, is good or bad; but if they are departing from that power which the law has vested in them; if they are assuming to themselves a power over property, which the law does not give them; this court no longer considers them as acting under the authority of their commission, but treats them, whether they be a corporation or individuals, merely as persons dealing with property without legal authority.”¹

§ 843. **The same subject; limitations of the writ.**—An injunction will not therefore lie to restrain administrative or political officers, from discharging their ordinary official functions. Thus, election officers cannot be enjoined from counting the votes and declaring the result of an

¹ Story Eq. Jurisp., 13th ed. § 955 *a*, citing *Frewin v Lewis*, 4 Myl. & Cr. 249; *Murray v Clarendon*, L. R., 9 Eq. 11; *Att’y Gen’l v Kirk*, L. R., 14 Eq. 558; *Vavasour v Krupp* (foreign sovereign), L. R., 9 Ch. D. 351; 39 L. T. 437; 27 W. R. 176; *Beebe v Robinson*, 52 Ala. 66, 75; *Graham v Horton*, 6 Kan. 343; *Missouri R., etc., Comp’y v Co. Com’rs*, 12 Kan. 230; *Lane v Morrill*, 51 N. H. 422;

People v Canal Board, 55 N. Y. 390; *Galloway v Jenkins*, 63 N. C. 147; *Mississippi v Johnson*, 4 Wall. (U. S.) 475; *Gaines v Thompson*, 7 Wall. (U. S.) 347. See also, *High on Inj.*, 3d ed., § 1,308, and cases cited; *Crawford v Carson*, 35 Ark. 565; *Dickey v Reed*, 78 Ill. 261; *Oliphant v Co. Com’rs*, 18 Kan. 386; *Knox v Police Jury*, 27 La. Ann. 204; *Gibbs v Usher*, 1 Holmes (U. S.) 348.

election,¹ or from holding an election;² nor can the commissioners of the canal fund be enjoined from making a loan;³ nor the comptroller-general from collecting the public revenues.⁴ And an injunction will not be granted, to restrain municipal officers from the exercise of the ordinary police powers of the municipal government.⁵ Nor will an injunction lie, to prevent a judge or a judicial officer, from acting in a cause pending before him, even although the statute under which he is acting, is unconstitutional;⁶ or to restrain criminal proceedings, or proceedings in mandamus⁷ or prohibition.⁸

§ 844. **Doctrine as to restraining the passage of a municipal ordinance.**—It has been held, that an injunction will not lie against a city or the common council of a city, to restrain them from passing, or against the mayor to restrain him from approving, an ordinance in violation of the plaintiff's right, on the ground that the court will not deal with hypothetical cases;⁹ but other authorities have held, that it will be granted to restrain the passage of a municipal ordinance, exceeding the scope of the municipal authority, in a case where the ordinance would work irreparable injury to the plaintiff, unless the ordinance

¹ *Weil v Calhoun*, 25 Fed. R. (U. S.) 865.

² *Harris v Schryock*, 82 Ill. 119.

³ *Thompson v Com'rs Canal Fund*, 2 Abb. Pr. (N. Y.) 248.

⁴ *Scofield v Perkerson*, 46 Ga. 350.
See also, *Secombe v Kittelson*, 29 Minn. 555.

⁵ *Sheen v Stothart*, 29 La. Ann. 630;
Hottinger v New Orleans, 42 La. Ann. 629;

Whitman v Hubbell, 20 Abb. N. C. (N. Y.) 385;

Kiernan v Newton, 20 Abb. N. C. (N. Y.) 398;

Emmons v Campbell, 22 Hun (N. Y.) 532.

⁶ *High Inj.*, 3d ed., § 46, citing *Platt v*

Woodruff, 61 N. Y. 378;

Sanders v Metcalf, 1 Tenn., Ch. 419.

Aliter, where an officer, other than a judicial officer, is proceeding under an unconstitutional statute, *post*. § 846.

⁷ *High Inj.*, 3d ed., § 63, and cases cited.

⁸ *Montague v Dudman*, 2 Ves. Sr. 396; per Lord Hardwicke, Ch'r, p. 398.

⁹ *Harrison v New Orleans*, 33 La. Ann. 222;

New Orleans Elev. R. Comp'y v New Orleans, 39 La. Ann. 127.

See also, *High on Inj.*, 3d ed., § 1,243;
Roudanez v New Orleans, 29 La. Ann. 271;

would be void upon its face, in which case the injunction will not lie.¹

§ 845. **Restraining police from entering a club house.**—The police authorities of a city may be restrained by injunction, from invading the precincts of a private club house, to interfere with its festivities, where such festivities do not constitute a breach of the peace, a nuisance, or other violation of the law or the public order.² But where the club sells tickets for the entertainment to the general public, the entertainment becomes a public affair, and the injunction will not lie.³

§ 846. **Generally lies to prevent public officers from acting without lawful authority to plaintiff's prejudice.**—And so, generally, an injunction lies to restrain public officers, other than judicial officers, from proceeding, in violation of law, to the prejudice of the plaintiff;⁴ as where they are proceeding under an unconstitutional statute, which, inasmuch as the statute is void, is equivalent to proceeding without lawful authority.⁵ Thus, an injunction lies against road supervisors, where, in excess of their authority they threaten to open a road through

¹ *Spring V. Waterworks v Bartlett*, 8 Sawyer (U. S.) 555.

See also, *Chicago M., etc., Comp'y v Lake*, 130 Ill. 42;

Des Moines Gas Comp'y v Des Moines, 44 Iowa 505;

Armstrong v St. Louis, 3 Mo. App. 151;

Murphy v East Portland, 42 Fed. R. (U. S.) 308;

Pierpont v Harrisville, 9 W. Va. 215.

² *Cercle Français, etc., v French*, 44 Hun (N. Y.) 123, citing

Graff v Evans, 8 L. R., Q. B. Div. 373, 377;

Springhead Spinning Comp'y v Riley, L. R., 6 Eq. Cas. 551, 558;

Seim v State, 55 Md. 566, 571;

Comm. v Smith, 102 Mass. 144;

Comm. v Pomphret, 137 Mass. 564, 566;

People v Canal Board, 55 N. Y. 390, 393;

Davis v American Soc'y, etc., 75 N. Y. 362, 369;

People v Dwyer, 90 N. Y. 402, 409;

State Lottery Comp'y v Fitzpatrick, 3 Wood (U. S.) 222.

³ *Cercle Français, etc., v French*, 44 Hun (N. Y.) 123.

⁴ *Roosevelt v Edson*, 51 N. Y. Super Ct. 227.

⁵ *State v Judge*, 42 La. Ann. 1104;

Waterloo Woolen, etc., Comp'y v Shanahan, 58 Hun (N. Y.) 50.

Contra, Thompson v Com'rs Canal Fund, 2 Abb. Pr. (N. Y.) 248.

the plaintiff's property;¹ but not where, although the order has been passed, no threats have been made to carry it into execution.² And an injunction lies against county officers, to prevent them from removing their offices from the established county seat, until the determination of a pending proceeding to settle its location;³ but they will not be enjoined from relocating the county seat, upon an allegation of fraud practiced upon them,⁴ nor on account of irregularities in the election authorizing the removal;⁵ nor where the question has been regularly considered and disposed of, especially if the plaintiff has participated in the proceedings.⁶ And an injunction will not lie, to prevent county commissioners from changing the depository of the public money.⁷ A tax payer may maintain a suit against a municipal corporation, to enjoin the collection of an illegal tax against him, if he has paid as much of the tax, if any, as he admits to be due;⁸ or to enjoin the collection of a tax based upon an illegal assessment.⁹

§ 847. **When irreparable injury must be shown.**—An injunction will not lie, against the proceedings of subordinate bodies and tribunals, on account of irregularities in their proceedings, unless it is shown that the interference of the court is necessary, to protect the plaintiff against irreparable damage and injury.¹⁰

¹ *Morgan v Miller*, 59 Iowa, 481.

For other rulings, relating to an injunction against road officers, see *Wetherell v Newington*, 54 Conn. 67; *Bryan v East St. Louis*, 12 Ill. App. 390; *Owens v Crossett*, 105 Ill. 354.

² *Weiss v Jackson Co.*, 9 Oreg. 470.

³ *Shaw v Hill*, 67 Ill. 455.

⁴ *Markle v Co. Com'rs*, 55 Ind. 185.

⁵ *Scott v McGuire*, 15 Nebr. 303;

⁶ *Ellis v Karl*, 7 Nebr. 381.

See also, *Sanders v Metcalf*, 1 Tenn. Ch. 419.

⁷ *First Nat. Bk. v Co. Com'rs*, 43 Kan. 648.

⁸ *London v Wilmington*, 78 N. C. 109.

See, however, *Louisiana Nat. Bk. v New Orleans*, 27 La. Ann. 446; *Levy v Shreveport*, 27 La. Ann. 620.

⁹ *Allwood v Cowen*, 111 Ill. 481.

¹⁰ *Prospect Park, etc., R. R. Company v Williamson*, 24 Hun. (N. Y.) 216.

See also, *Mobile v Louisville, etc., R. R. Comp'y*, 84 Ala. 115; *City Council v the same*, 84 Ala. 127; *Mooers v Smedley*, 6 Johns. Ch., (N. Y.) 28;

Hyatt v Bates, 35 Barb. (N. Y.) 308; *Albany, etc., R. R. Comp'y v Brownell*, 24 N. Y. 345.

§ 848. **There must be no adequate remedy at law.**—The rule is familiar, that, except in certain special cases, an injunction will not lie, where there is a full and adequate remedy at law.¹ Thus an injunction will not be allowed, to prevent the secretary of state from issuing to another a grant of land, which the plaintiff has entered, where the plaintiff can avail himself of the objections, on obtaining a grant to himself;² or to restrain town officers from arresting and fining the plaintiff, for violation of an unlawful town ordinance, as he has a sufficient remedy by action.³ An injunction will not lie, to restrain the acts of the officers of an illegally organized municipal corporation, as there is a remedy by information in the nature of a *quo warranto*.⁴ Nor will an injunction lie, to restrain a collector from collecting a tax on the plaintiff's property, and to have the assessment declared void, on the ground that the assessors were not officers *de jure* or *de facto*, because the wrong may be redressed by certiorari, or by an action at law against the collector, for executing a warrant which is void on its face.⁵

§ 849. **Doctrine as to enjoining discretionary power.**—The rule, with respect to granting an injunction, where the matter complained of is left by the law to the discretion or judgment of the officer, against whom it is asked, is the same, as where any of the other remedies, treated in this chapter, is asked in a similar case; namely, that the court will not interfere to review, control, or restrain

¹ High on Injunctions, 3d ed., § 28, citing *Richards v Kirkpatrick*, 53 Cal. 433; *Winkler v Winkler*, 40 Ill. 179; *Welde v Scotten*, 59 Md. 72; *Hetrick v Page*, 82 N. C. 65; *Coe v Columbus, etc., Comp'y*, 10 Ohio St. 372; *Moore v Steelman*, 80 Va. 331. See also, *Davis v Hinton*, 29 Ill. App. 327; *Nicholson v Cook*, 76 Ga. 24;

Gilmore v Wells, 78 Ga. 197; *Neiser v Thomas*, 99 Mo. 224; *Penn v Ingles*, 82 Va. 65, *cum multis aliis*.

² *Brem v Houck*, 101 N. C. 627.

³ *Cohen v Goldsboro*, 77 N. C. 2.

⁴ *MacDonald v Rehner*, 22 Fla. 198.

⁵ *Delaware, etc., Canal Comp'y v Atkins*, 121 N. Y. 246, *aff'g* 48 Hun (N. Y.) 456.

the exercise of the powers by the officer or officers, in whom the law has vested the discretion or judgment to exercise the same.¹ But in this respect, the power of a court of equity to interfere by injunction exceeds that of a court of law; for equity will review the exercise of a discretionary power, which is tainted with fraud, or where it is necessary so to do, in order to prevent abuse, injustice, or violation of a trust.²

§ 850. **Cannot be used to try collaterally the title to an office.**—It is well settled, that an injunction will not lie to oust a usurper from a public office, and to put the rightful officer into possession, as that relief can be obtained by information in the nature of a quo warranto.³ Nor will it lie, in aid of an information, or other proceeding to try the title, by restraining the person in possession from exercising the functions, or receiving the emoluments of the office, even upon an allegation of insolvency;⁴ nor will

¹ *Andrews v Knox Co.*, 70 Ill. 65;
Fitzgerald v Harms, 92 Ill. 372;
Featherston v Small, 77 Ind. 143;
First Nat'l Bk. v Co. Com'rs, 43 Kan.
 648;

Wiley v B'd of Com'rs, 51 Md. 401;
Lane v Morrill, 51 N. H. 422;
McKinley v Freeholders, 29 N. J. Eq.
 164;

Moovers v Smedley, 6 Johns. Ch. (N. Y.)
 23;

Kelsey v King, 32 Barb. (N. Y.) 410;
People v Mayor, etc., 32 Barb. (N. Y.)
 102;

Cleveland, etc., Comp'y v Fire Com'rs,
 55 Barb. (N. Y.) 288;

Phelps v Watertown, 61 Barb. (N. Y.)
 121;

United States Ill. Comp'y v Grant, 55
Hun (N. Y.) 222;

Cooper v Williams, 4 Ohio 253.

² *Ante*, § 555.

³ *Dickey v Reed*, 78 Ill. 261;
Muhler v Hedekin, 119 Ind. 481;
Osgood v Jones, 60 N. H. 543;

People v Wiant, 48 Ill. 263;
Markle v Wright, 13 Ind. 548;
Cochran v McCleary, 22 Iowa 75;
Hughes v Parker, 20 N. H. 58;
Demarest v Wickham, 63 N. Y. 320;
Updegraff v Crans, 47 Pa. St. 103.
 See also, *Beebe v Robinson*, 52 Ala. 66;
Moulton v Reid, 54 Ala. 320;
Guillotte v Poincy, 41 La. Ann. 333;
Planters' C. Ass'n v Hanes, 52 Miss. 469;
Patterson v Hubbs, 65 N. C. 119;
Sneed v Bullock, 77 N. C. 282;
Kilpatrick v Smith, 77 Va. 347, and
ante, § 392.

⁴ *McDonald v Rehrer*, 22 Fla. 198;
Stone v Wetmore, 42 Ga. 601;
Foster v Moore, 32 Kan. 483;
Neeland v State, 39 Kan. 154;
Tappan v Gray, 9 Paige (N. Y.) 507;
People v Draper, 24 Barb. (N. Y.) 265;
Hagner v Heyberger, 7 W. & S. (Pa.)
 104;
Campbell v Taggart, 10 Phil'a (Pa.) 443.
 See, however, *Colton v Price*, 50 Ala.
 424.

equity interfere, to enjoin the incumbent of a municipal office from acting in the office, where, upon an election for a new term, there was a tie between him and another candidate, and the common council of the city has failed to determine the result by lot, as the statute requires.¹ So, the title of the members of the board of police of a city cannot be impeached, under the statute, allowing a tax payer to have an injunction against unlawful expenditures, by a petition to prevent the passing and appropriation by the municipality, of money to pay the salaries of the members and their officers, and the expenses of the police department, upon the requisition of the board.²

§ 851. **Injunction in behalf of tax payers to prevent misappropriation of public money.**—In many of the states, statutes have been enacted, empowering any one or more tax payers, to maintain an equitable action against public officers, to restrain illegal acts, tending to increase the taxation, or to divert the public revenues or other property from their proper objects; and to have an injunction in aid of such an action, upon sufficient cause shown. Whether, in the absence of such a statute, a person, having no special interest to protect, may maintain such a suit, founded upon his general interest as a tax payer in the reduction of the public taxes, and the due appropriation of the public property and revenues, is a question, upon which there has been a conflict of opinions in the adjudicated cases. In several, the courts have held, that such a suit cannot be maintained, by an individual tax payer; and that the only person, who can prosecute for such relief, is the attorney-general in behalf of the state;³ and that where a statute has been enacted

¹ *Huels v Hahn*, 75 Wis. 468.

² *Prince v Boston*, 148 Mass. 285.

³ *Linden v Case*, 46 Cal. 171;
Merriam v Sup'rs, 72 Cal. 517;

Wood v Bangs, 1 Dak. 179;

Louisiana Nat'l Bank v New Orleans,
 27 La. Ann. 446;

Miller v Grandy, 13 Mich. 540;

Steffes v Moran, 68 Mich. 291;

permitting a private tax payer to maintain such a suit, a suit cannot be maintained, in a case which is not within the terms of the statute.¹ It has also been held, that the attorney-general, although he may thus interfere to protect the funds and property of the state, cannot maintain a suit, in behalf of the state, for the protection of the funds and property of a municipal corporation.²

§ 852. **The same subject.**—On the other hand, it has been held, in a preponderating number of cases, that one or more tax payers, may, in behalf of themselves and all others similarly situated, maintain a suit in equity, and have an injunction, to restrain illegal acts of public officers, which will increase the taxation, or divert to improper and unlawful purposes the public funds or other property; and this, without the aid of a statute, and on the ground that such acts will work an irreparable injury to the plaintiffs.³

- Roosevelt v Draper, 23 N. Y. 318;
 Kilbourne v St. John, 59 N. Y. 21, aff'g
 7 Lans. (N. Y.) 352;
 Comins v Supervisors, 64 N. Y. 626;
 aff'g 3 T. & C. (N. Y.) 296.
 See, however, Curtenius v Grand
 Rapids, etc., R. R. Comp'y, 37 Mich.
 583, not noticed in 68 Mich. 291, before
 cited.
- ¹ Alvord v Syracuse Sav. Bank, 34 Hun
 (N. Y.) 143;
 Lutes v Briggs, 64 N. Y. 404, rev'g 5
 Hun (N. Y.) 67.
- ² People v Ingersoll, 58 N. Y. 1;
 People v Fields, 58 N. Y. 491.
 See also, State v McLaughlin, 15 Kan.
 228; and contra, State v Saline
 County Court, 51 Mo. 350.
- ³ New Orleans, etc., R. R. Comp'y v
 Dunn, 51 Ala. 128;
 Smith v Magourich, 44 Ga. 163;
 Dent v Cook, 45 Ga. 323;
 Hudson v Mayor, etc., 64 Ga. 286;

- Sherlock v Winnetka, 59 Ill. 389, 68 Ill.
 530;
 Chestnutwood v Hood, 68 Ill. 132
 Leitch v Wentworth, 71 Ill. 146;
 Springfield v Edwards, 84 Ill. 626;
 McCord v Pike, 121 Ill. 288;
 Warren Co. Ag'l, etc., Comp'y v Barr,
 55 Ind. 30;
 Rothrock v Carr, 55 Ind. 334;
 Valparaiso v Gardner, 97 Ind. 1;
 Hospers v Wyatt, 63 Iowa 264;
 Allison v Louisville, etc., R. R. Comp'y,
 9 Bush (Ky.) 247;
 Patton v Stephens, 14 Bush (Ky.) 324;
 Frantz v Jacob, 88 Ky. 525;
 Allen v Jay, 60 Me. 124;
 Mayor, etc., v Gill, 31 Md. 375;
 Peter v Prettyman, 62 Md. 566;
 Mayor, etc., v Keyser, 72 Md. 106;
 Pope v Halifax, 12 Cush. (Mass.) 410;
 Sinclair v Co. Com'rs, 23 Minn. 404;
 State v Saline Co. Ct., 51 Mo. 350;
 Newmeyer v Missouri, etc., R. R.
 Comp'y, 52 Mo. 81;

§ 853. **The same subject; rulings in New York.**—In the state of New York, the courts of which had very strenuously denied the right of a private tax payer to interfere in such cases, a very comprehensive statute, allowing one or more tax payers to maintain an action in the nature of a suit in equity, and to have an injunction, for relief against misappropriation of public funds or other property, and other illegal acts, and making other provisions for the same general object, was passed in 1872,¹ and has been construed, in several adjudications of the courts of that state. In the first case under it, which reached the court of appeals, the court held, that the act was to be liberally construed; that it was sufficient to embrace every wrong by which taxes might be increased; that it included “not only property and funds in possession, but the credit and the power of taxation, and of borrowing money in anticipation of taxation, and every process and means, whereby a municipal corporation can be charged pecuniarily, or the taxable property within its limits burdened.”² It is no defence to an action under

Black v Ross, 37 Mo. App. 250;
Davenport v Kleinschmidt, 6 Mont.
502;.

Normand v Co. Com'rs, 8 Nebr. 18;
Merrill v Plainfield, 45 N. H. 126;
Brown v Concord, 56 N. H. 375;
London v Wilmington, 78 N. C. 109;
Hays v Jones, 27 Ohio St. 218;
Wheeler v Philadelphia, 77 Pa. St. 338;
Delano Land Comp'y's Appeal, 103
Pa. St. 347;
Place v Providence, 12 R. I. 1;
Austin v Coggeshall, 12 R. I. 329;
Crampton v Zabriskie, 101 U. S. 601;
List v Wheeling, 7 W. Va. 501;
Nevil v Clifford, 55 Wis. 161;
Willard v Comstock, 58 Wis. 565.

¹ This act, L. 1872, ch. 161, has since been amended several times, and as amended, § 1 thereof now constitutes § 1925 of the Code of Civil Pr

cedure of that state.

² *Ayers v Lawrence*, 59 N. Y. 192, per Allen, J., p. 198.

Followed, *Hills v Peekskill Sav. Bk.*, 26 Hun (N. Y.) 161;

Metzger v Attica, etc., R. R. Comp'y, 79 N. Y. 171.

For other rulings under this statute, and the amendments thereto, see *Lee v Sup'rs*, 62 How. Pr. (N. Y.) 201; *Roosevelt v Edson*, 51 N. Y. Super. Ct. 227;

People v Edson, 51 N. Y. Super. Ct. 238; *Osterhout v Hyland*, 27 Hun (N. Y.) 167; aff'd, *sub nom.* *Osterhoudt v Rigney*, 98 N. Y. 222.

Standart v Burtis, 46 Hun (N. Y.) 82; *Armstrong v Grant*, 56 Hun (N. Y.) 226; *Warrin v Baldwin*, 105 N. Y. 534, rev'g 35 Hun (N. Y.) 334;

Ziegler v Chapin, 126 N. Y. 342.

the act, that the illegality relied upon would form a good defence by the municipality;¹ or that the tax payer has other sufficient remedies for the wrong complained of.² But, in some other respects, the same objections will lie to a suit under the act, as to other equitable suits, as, for instance, that considerable time has elapsed, since the commission of the wrong of which complaint is made, and that innocent persons have meanwhile acquired rights in good faith.³ An action cannot be maintained under the act, where the real object is to benefit the individual, and not the public. Thus, an injunction to prevent the sale of a ferry franchise was refused, where the real parties interested were those enjoying the franchise, who were seeking to protect themselves in the enjoyment thereof;⁴ but an unsuccessful bidder at such a sale was allowed to maintain the action.⁵ The action cannot be maintained, to restrain the continuance of a public work, because no previous proceedings have been taken to compensate the city; it lies only for official misconduct.⁶ Nor can it be maintained, unless the plaintiff shows that he will, as a tax payer, sustain a pecuniary loss, in consequence of the act of which complaint is made;⁷ nor unless corruption, or fraud, or bad faith equivalent to fraud, is charged and proved, since the statute was not intended to reach cases, where the proposed action is only unwise, and without due regard to economy.⁸

¹ *Osterhoudt v Rigney*, 98 N. Y. 222, per Andrews, J., p. 231.

² *In re Eastchester*, 53 Hun (N. Y.) 181.

³ *Calhoun v Millard*, 121 N. Y. 69.

⁴ *Hull v Ely*, 2 Abb. N. C. (N. Y.) 440.

⁵ *Starin v Mayor, etc.*, 42 Hun (N. Y.) 549.

⁶ *Ottendorfer v Agnew*, 13 Daly (N. Y.) 16.

⁷ *Peck v Belknap*, 55 Hun (N. Y.) 91.

⁸ *Talcott v Buffalo*, 125 N. Y. 280, rev'g 57 Hun (N. Y.) 43.

CHAPTER XXXII

CRIMINAL PROCEEDINGS AGAINST A PUBLIC OFFICER

CONTENTS

- SEC. 854. Liability of public officers to criminal proceedings, generally provided for by statute; this chapter treats only of common law rules relating thereto; references to former chapters, where the subject is incidentally treated.
855. General rules; respecting officers' common law liability for neglect of their duties.
856. The same, for wilful or corrupt abuse of discretionary power.
857. The same, for fraud or breach of trust, respecting public funds or other public property.
858. Exception in case of superior officers of government, who are punishable only by impeachment; and of legislators. *Quere*, if the latter are punishable in any way.
859. Exception in case of exercise of a judicial or *quasi* judicial function.
860. Superior judicial officers not punishable by indictment for any judicial act, however wrongful or corrupt.
861. Justices of the peace punishable, only where the act was instigated by a dishonest, oppressive, or corrupt motive; instances.
862. Jurors punishable at common law by attain, etc.; now not punishable, except under statute.
863. Miscellaneous rulings, as to liability at common law of ministerial officers to punishment.
864. Common law rules, in cases of bribery, attempts to bribe, etc.
865. Usurpation of office punishable.

§ 854. **This chapter confined to common law rules.**—In Great Britain and in this country, the subject of crimes committed by public officers—by which, of course, is meant crimes, committed by them, in the course of the

discharge of their official functions, or under color of their respective offices, as distinguished from crimes, committed without connection with their official character—is amply provided for by numerous statutes, defining the same, and prescribing the punishment thereof. It is foreign to the object of a work of this character, to consider these various enactments, which have superseded the common law, with respect to the matters for which they provide; and the subject of criminal procedure is also without our sphere. Both of these subjects are treated at length, in many voluminous treatises, devoted specially thereto. In this chapter, we shall aim only to present the rules of the common law, respecting the crimes specified, which rules are in force, wherever they are not expressly or impliedly superseded by statutory provisions, and form the foundation of the different statutes referred to. Some of these rules have already been stated in the preceding chapters of this work, in considering the subjects to which they relate.¹

§ 855. **Common law rules as to neglect.**—The liability of a public officer, at common law, to indictment and punishment, for neglect to perform, or misconduct in the performance of, his official functions, is stated in some of the books in very broad terms. Thus, in a justly celebrated work on crimes, it is said: “Where an officer neglects a duty incumbent upon him, either by common law or by statute, he is indictable for his offence; and this, whether he be an officer of the common law, or appointed by act of parliament; and a person, holding a

¹ That bargaining for an office or for official conduct is indictable at common law, see *ante*, §§ 49, 55. So as to a refusal to serve in a public office, to which one has been duly chosen, *ante*, §§ 165, 166, 409. So as to extortion by a public officer, § 525. As to impeachment of a public officer,

see *ante*, §§ 399, 400. That an officer *de facto* is liable to indictment and punishment, in like manner as if he was an officer *de jure*, see *ante*, § 668. That taking interest, by a custodian of public money, from a bank of deposit, is not an offence at common law, see *ante*, § 255.

public office under the king's letters patent, or derivatively from such authority, has been considered amenable to the law for every part of his conduct, and obnoxious to punishment for not faithfully discharging it; and it is laid down generally, that any public officer is indictable for misbehavior in his office. There is also the further punishment of the forfeiture of the office, for the misdemeanor of doing anything, contrary to its design. . . . Where a duty is thrown upon a body of several persons, and they neglect it, each is individually liable to prosecution for the neglect." ¹ In another standard work, it is said: "Every officer commits a misdemeanor, who wilfully neglects to perform any duty, which he is bound, either by common law or by statute, to perform, provided that the discharge of such duty is not attended with greater danger, than a man of ordinary firmness and activity may be expected to encounter." ² And another leading writer states, that an indictment lies against a ministerial officer, for wilful or negligent misconduct in office, which works injury to the public or to an individual. ³ Still another distinguished American author states, that the general doctrine is, that "any act or omission, in disobedience of official duty, by one who has accepted public office, is, when of public concern, in general, punishable as a crime. This is particularly the

¹ 1 Russell on Crimes by Sharswood, 9th American ed. 199, 200; citing *Reg. v Wyat*, 1 Salk. 380; *Anon.* 6 Mod. 96; *Rex v Bembridge*, 1 Salk. 381, *note*; *Rex v Hollond*, 5 T. R. (D. & E.) 607.

² Stephen Dig. Crim. Law, art. 122. See also, *Crouther's case*, Cro. Eliz. 654; *Rex v Commings*, 5 Mod. 179; *Rex v Barlow*, 2 Salk. 609; *Rex v Boys*, Say. 143.

³ Wharton Crim. Law, 9th ed., § 1,568, citing:

Ex parte Harrold, 47 Cal. 129; *People v Coon*, 15 Wend. (N. Y.) 277; *People v Norton*, 7 Barb. (N. Y.) 477; *State v Leigh*, 3 Dev. & Bat. (N. C.) 127; *State v McEntyre*, 3 Ired. L. (N. C.) 171; *State v Maberry*, 3 Strobb. (S. C.) 144; *Cross v State*, 1 Yerg. (Tenn.) 261; *State v Buxton*, 2 Swan (Tenn.) 57. See also, *Housh v People*, 75 Ill. 487; *State v Startup*, 39 N. J. L. 423; *State v Kern*, 51 N. J. L. 259; *State v Justices*, 4 Hawks (N. C.) 194; *State v Furguson*, 76 N. C. 197; *State v Hawkins*, 77 N. C. 494. •

case, where the thing required is of a ministerial or other like nature, and there is reposed in the officer no discretion." But, the writer continues, "one serving in a judicial or other capacity, in which he is required to exercise a judgment of his own, is not punishable for a mere error therein, or for a mistake of law." ¹

§ 856. **Wilful or corrupt abuse of discretionary power.**—Similarly, it is laid down in the books, that the wilful or corrupt abuse of discretionary power, by any officer, is punishable at common law. Thus, a distinguished English jurist, already quoted, says: "Every public officer commits a misdemeanor, who, in the exercise or under color of exercising the duties of his office, does an illegal act, or abuses any discretionary power, with which he is invested by law, from an improper motive, the existence of which motive may be inferred, either from the nature of the act, or from the circumstances of the case. But an illegal exercise of authority, caused by a mistake in the law, made in good faith, is not a misdemeanor within this article." ²

§ 857. **Fraud or breach of trust in respect to public funds or property.**—So also, where an officer is guilty of fraud or breach of trust, respecting the public funds or other public property in his hands. "Every public officer commits a misdemeanor, who, in the discharge of the duties of his office, commits any fraud or breach of trust,

¹ Bishop Criminal Law, 7th ed., §§ 459, 460, citing numerous cases. See also, *post*, § 859.

² Stephen Dig. Crim. Law, art. 119;
1 Russell Crimes by Sherwood, 9th Amer. ed., 200, 201;
Wharton Crim. L., 9th ed. § 1572;
Case of Scroggs, Ch. J., 8 How. St. Tr. 163, 190;
Rex v Okey, 8 Mod. 45;

Reg. v Badger, 4 Q. B. (Ad. & Ell. N. S.) 468;

Rex v Young, 1 Burr. 556, 560, *et seq*;
Rex v Williams, 3 Burr. 1317;
Rex v Hann, 3 Burr. 1716, 1786;
Rex v Bembridge, 3 Dougl. 327;
Rex v Jackson, 1 T. R. (D. & E.) 653;
Rex v Holland, 1 T. R. (D. & E.) 692;
State v Wedge, 24 Minn. 150;
State v Williams, 12 Ired. L. (N. C.) 172.
See also, *post*, § 859.

affecting the public, whether such fraud or breach of trust would have been criminal or not, if committed against a private person.”¹ Upon an indictment for misbehavior in office, for not duly accounting for public moneys, it was said that gross negligence, in the discharge of a fiduciary duty, is evidence of fraud and misbehavior in office; that an habitual neglect to account for small sums by a public officer, authorizes and requires the presumption, that the sums retained and not accounted for, were retained for sinister and selfish purposes; and a gross and unscrupulous negligence in the keeping of his accounts, instead of rebutting such presumption, strengthens and supports it.² But a ministerial officer is not liable to indictment for misconduct of his deputy, in which he did not personally participate.³

§ 858. **Exception as to superior officers of government, and legislature.**—Two classes of exceptions to the general rule, that an officer is punishable criminally at common law for misfeasance, malfeasance, or nonfeasance in the discharge of, or under color of, his office, seem to be recognized by the authorities. The first relates to the rank of the officer, or the general nature of his functions. Thus, it has been said that the superior officers of the national and state governments cannot be punished for official misconduct by indictment; they are punishable by impeachment only.⁴ And that the same rule applies to members of the national and state legislatures.⁵ Indeed,

¹ Stephen Dig. Crim. Law, art. 121;

1 Russell on Crimes, 9th Am. ed. by Sharswood, pp. 207, 208;

Wharton Crim. L., 9th ed., § 1572 *a*;

Rex v Bembridge, 3 Dougl. 327, cited

Rex v Southerton, 6 East 136;

Rex v Martin, 2 Campb. 268;

Townson v Wilson, 1 Campb. 396;

Rex v Jones, 31 How. St. Tr. 251.

² Comm. v Rodes, 6 B. Mon. (Ky.) 171.

³ Comm. v Lewis, 4 Leigh (Va.) 664.

See also, *ante*, § 538.

⁴ Wharton Crim. Law, 9th ed., § 1,571; Bishop Crim. Law, 7th ed., § 462.

But it was held, in the year 1800, that the secretary of state of North Carolina, was indictable for fraudulently issuing land warrants. *State v Glasgow*, N. C. Conf. R. 176 (38).

⁵ Bishop Crim. Law, 7th ed., § 462.

the principal treatises maintain that a member of the legislature is not liable, even to impeachment, for any official act or omission.¹

§ 859. **Exception in case of judicial or quasi judicial functions.**—The second class of exceptions relates to the nature and character of the particular functions, with respect to which the officer's nonfeasance, misfeasance, or malfeasance was committed. It is well settled, that a judicial officer, from the highest to the lowest grade, is not punishable criminally for an honest error or mistake, made by him in performing a judicial act, of which he had jurisdiction.² So also an officer, exercising a *quasi* judicial power, is not punishable for any honest mistake or error of judgment in the exercise of that power, but only for an abuse of his power, proceeding from a corrupt or other improper motive.³ But it has been said, that the rule is otherwise, if his ignorance of the law "is negligent."⁴

§ 860. **The same subject; superior judicial officers.**—But with respect to judges of courts of record, the authorities go further, and hold, that they are not punishable by indictment, but liable only to impeachment, for any act, however wilful or corrupt, performed in the discharge of their judicial functions. Thus, in one of the earliest records, it was said, that where A was indicted, for that, being a judge of oyer and terminer, certain persons were indicted before him of trespass, and he had entered upon the record that they were convicted of felony, and

¹ Story Const., § 795;
1 Kent. Commen., 235, *note*;
Bishop Crim. L., 7th ed., § 461;
See also, Lord Denman, Ch. J., in
Howard v Gosset, Car. & Mar. 380;
In re Speakership, 15 Colo. 520, cited
ante, § 400, *note*.
Contra, per Lord Coke, 4 Inst. 24.

² Bishop Crim. Law, 7th ed., §§ 460, 299,
citing numerous cases;
See also, *post*, § 860.

³ *Id.*; See also, Wharton Crim. L., 9th
ed., § 85, citing many cases; and
ante, § 855.

⁴ Wharton, *ubi supra*, citing *Rex v*
Stukely, 12 Mod. 493.

judgment was demanded, if he should answer for falsifying the record, since he was a judge by commission; and all the judges were of opinion that the presentment was void.' And one of the most distinguished of the American judges, after mentioning this case, said: "Judges of all courts of record, from the highest to the lowest, and even jurors, who are judges of fact, were always exempted from prosecution by action or indictment, for what they did in their judicial character." ² So, in a standard text book, it is said: "The oppression and tyrannical partiality of judges, justices, and other magistrates, in the administration and under color of their offices, may be punished by impeachment in parliament, or by information or indictment, according to the rank of the offender, and the circumstances of the case." ³ Another leading author says, that judges and justices of the peace are not liable to indictment for judicial, as distinguished from ministerial acts; but justices of the peace are indictable for misconduct, in matters as to which they are not invested with judicial discretion, if the misconduct was not imputable to mere error of judgment.⁴

¹ Year Book (Book of Assize), Part V, p. 135; 27 Ed. III, pl. 18.

² *Yates v Lansing*, 5 Johns. (N. Y.) 282, per Kent, Ch. J., 292, citing *Staunforde P. C.*, p. 173; *Floyd v Barker*, 12 Coke. 23.

Approved, *Lange v Benedict*, 73 N. Y. 12, per Folger, Ch. J., p. 25.

³ Russell on Crimes, Sharswood's 9th Amer. ed., p. 200, citing 4 Blackst. Commen. 141;

Rex v Palmer, 2 Burr. 1,162.

⁴ Wharton on Criminal Law, 9th ed., § 1,571, citing, in addition to the cases cited *ante*,

Rex v Webb, 1 W. Blackst. 19;

Reg. v Badger, 6 Jur. 994;

Houlden v Smith, 14 Q. B. (Ad. & Ell., N. S.) 841;

State v Odell, 8 Blackf. (Ind.) 306;

Downing v Herrick, 47 Me. 462;

Pratt v Gardner, 2 Cush. (Mass.) 63;

State v Gardner, 2 Mo. 23;

Cunningham v Bucklin, 8 Cow. (N. Y.) 178;

People v Coon, 15 Wend. (N. Y.) 277;

State v Sneed, 84 N. C. 816;

Wilson v Comm., 10 S. & R. (Pa.) 373;

Comm. v Alexander, 4 Hen. & Munf. (Va.) 522;

Jacobs v Comm., 2 Leigh (Va.) 709;

Wallace v Comm., 2 Va. Cas. 130;

Comm. v Callaghan, 2 Va. Cas. 460.

The same rule is given in 1 Hawk. P. C., ch. 72 s. 6., except where a judge so far forgets his dignity, etc., as to "privately tamper with witnesses, or labour jurors."

§ 861. **The same subject; justices of the peace.**—With respect to the liability to punishment of justices of the peace, Lord Tenterden said, that whenever justices have been challenged by indictment or information, the question is, “not whether the act done might, upon full and mature investigation, be found strictly right, but from what motive it had proceeded; whether from a dishonest, oppressive, or corrupt motive, under which description fear and favor may generally be included; or from mistake or error. In the former case alone, they have been the objects of punishment.”¹ But where a magistrate acts wilfully and in direct defiance of the law, he is punishable, without reference to his motives.² Thus, the arrest and imprisonment of a person, by direction of a justice of the peace, without reason or probable cause, and under color of his office, is “an abuse of the authority of his office; a pretended, not a real exercise of his jurisdiction,” and a misdemeanor at common law.³ So, a justice of the peace is indictable, for “not actively assisting in suppressing” a riot, which it is his duty to suppress;⁴ or for neglect in not suppressing a riot;⁵ and upon the trial, in the latter case, the judge charged the jury that the question was whether the defendant “did all that he knew was in his power, and which would be expected from a man of ordinary prudence, firmness, and activity.”⁶ And it is a misdemeanor, at common law, for a justice of the peace to act as agent for one of the parties litigating before him.⁷

¹ *Rex v Borron*, 3 B. & Ald. 432;
See also, *Ex parte Fentiman*, 2 Ad. & Ell. 127;
Bishop Crim. Law, 7th ed., § 299, and cases cited.

² *Rex v Sainsbury*, 4 T. R. (D. & E.) 451;
Reg. v Dodson, 9 A. & E. 704;
Reg. v Badger, 4 Q. B. (Ad. & Ell., N. S.) 468.

³ *Kelly v Moore*, 51 Ala. 364, per Brickell, J., pp. 365, 366.

⁴ *Republica v Montgomery*, 1 Yeates, (Pa.) 419.

⁵ *Rex v Pinney*, 5 Car. & P. 254, 270.

⁶ *Id.*

⁷ *Limerick v Murlatt*, 43 Kan. 318;
Boyer v Potts, 14 Serg. & R. (Pa.) 157.

§ 862. **Criminal liability of jurors.**—With respect to jurors, formerly their lot was a hard one. Where their verdict was “notoriously wrong,” they might “be punished, and the verdict set aside, by attain; but in criminal cases only at the suit of the king, not at the suit of the prisoner.”¹ An attain was tried by a jury of double the original number, and composed of men of larger property; and if they found against the juror, he was stripped of all he had, and imprisoned. In this and other respects, jurors were “treated with a degree of tyranny, which it is almost frightful to contemplate,” being also liable, in criminal cases, if the verdict was displeasing to the crown, to be called before the star-chamber, and fined and imprisoned.² These tyrannical proceedings were not formally abolished, until 6 Geo. IV, ch. 50; but they had been disused for three hundred years previously.³ Doubtless the rule in England now is, as it has always been in the United States, that a juror is not liable to prosecution, either civilly or criminally, except as prescribed by statute.⁴

¹ Blackst. Commen., vol. 4, p. 361.

² For an interesting history of attainments, and the barbarous treatment of jurors in other respects, see Mr. Forsyth's *Trial by Jury*, pp. 149-154; also *Kennedy Law and Practice of Juries*, pp. 32-34; *Stephen Hist. Crim. Law*, Vol. 1, pp. 304-307. But it was said in *Bushell's Case*, Vaughan 135, p. 146, that at common law, attainments lay only in writs of assize; and they were extended to other cases by acts of parliament. In “the olden time,” where one juror held out against the other eleven, the verdict of the eleven might be taken, and the twelfth committed to prison. Forsyth, pp. 199, 200.

³ *Kennedy L. & Pr. Juries*, p. 33.

See also, per Lord Mansfield, Ch. J., *Bright v Lyon*, 1 Burr. 390, at p. 393.

In Phillips on Juries, p. 215, it is said that no trace of a conviction for a false verdict is found in our legal annals, and that no proceeding therefor has been brought, since the reign of Elizabeth.

⁴ *Bushell's Case*, Vaughan 135; 6 How. St. Tr. 999.

See also, 1 Hawk. P. C., ch. 72, § 5 (where, however, the author says that jurors are still liable to attain in a civil cause);

Bishop Crim. L., 7th ed., § 462;

Yates v Lansing, 5 Johns. (N. Y.) 282, per Kent, Ch. J., p. 292, quoted *ante*, § 860. In 1667, parliament resolved, that the practice of fining or imprisoning jurors for giving their verdicts was illegal. Phillips on Juries, p. 221.

§ 863. **Miscellaneous rulings as to criminal liability of ministerial officers.**—A few rulings, in special cases, respecting the liability, at common law, of an officer performing ministerial duties, to indictment and punishment, will be added. An overseer of the poor is indictable for misfeasance or malfeasance, with respect to the relief of the poor under his charge.¹ *Seem*, that a clergyman of the church of England, who is, *quoad hoc*, a public officer,² is guilty of a misdemeanor, for refusing to marry two persons, who may lawfully be married.³ A constable is guilty of a misdemeanor, for refusing to arrest a person, who commits a felony in his presence;⁴ or for refusing to make a hue and cry against a burglar.⁵ A coroner is guilty of a misdemeanor, for refusing to hold an inquest upon the body of a person within his jurisdiction.⁶ A sheriff is guilty of a misdemeanor, for refusing to execute a criminal duly sentenced to death, and delivered to him for that purpose.⁷ A sheriff or constable is indictable, for not taking to prison one committed on a magistrate's warrant; and so is the keeper of the jail for refusing to receive such a person.⁸ A sheriff or constable is indictable, for failure to return a precept, according to the command thereof.⁹ And if the default occurs during his term of office, the indictment may be found after the expiration thereof.¹⁰

§ 864. **Common law rules in cases of bribery, attempts, etc.**—Giving or receiving a bribe, to influence official

¹ Tawney's Case, 16 Vin. Abr. 415; .
Rex v Winship, Cald. 72;
Rex v Compton, Cald. 246;
Rex v Wetherill, Cald. 432;
Rex v Herbert, 1 East P. C., c. 11, s. 11.
p. 461;
Rex v Tarrant, 4 Burr. 2106.

² *Ante*, § 9.

³ Reg. v James, 2 Den. Cr. Cas. 1.

⁴ 2 Hawk. P. C., ch. 13, s. 7.

⁵ Crouther's Case, Cro. Eliz. 654.

⁶ 2 Hale P. C. 58.

⁷ Rex v Antrobus, 2 Ad. & Ell. 788.

⁸ Reg. v Johnson, 11 Mod. 62;
Rex v Mills, 2 Show. 181;
Rex v Cope, 7 C. & P. 720.

⁹ Reg. v Wyatt, 1 Salk. 380; 2 Ld. Raym. 1189.

¹⁰ State v Sellers, 7 Rich. L. (S. C.) 368.

action, is indictable at common law;¹ so is the attempt to bribe a judge, although he refuses to receive the bribe;² or a cabinet minister.³ And the American cases hold, that a public officer is indictable for receiving a bribe, directly or indirectly, in money or other benefit, although no improper act followed; and that a person is indictable, for offering an officer a bribe, although it was not accepted,⁴ and although the matter was not within the officer's jurisdiction;⁵ and that a proposition by an officer to receive a bribe, to influence his official conduct, is a misdemeanor at common law, although the case is not within the statute against bribery.⁶

§ 865. **Usurpation of office a common law crime.**—It is an indictable offence, at common law, for one knowingly to procure himself to be sworn into an office, to which he has no title.⁷

¹ Russell on Crimes, 9th Am. ed. by Sharswood, 223, citing 4 Blackst. Commen. 139; 3 Inst. 149; 1 Hawk. P. C., c. 67, s. 2;

Rex v Beale, cited Rex v Gibbs, 1 East 183;

Rex v Vaughan, 4 Burr. 2494.

Bribery of voters, at an election for members of parliament, is also an indictable offence at common law.

Rex v Pitt, 3 Burr. 1335;

Hughes v Marshall, 2 Tyrw. 134; 2 C. & J. 118; 5 C. & P. 150.

See *ante*, §§ 75, 77.

² Russell on Crimes, 9th Am. ed., by Sharswood, 223.

³ *Id.*; citing cases *supra*, and Rex v Pollman, 2 Campb. 229.

⁴ Barefield v State, 14 Ala. 603; Dishon v Smith, 10 Iowa 212; Hutchinson v State, 36 Tex. 293; United States v Worrall, 2 Dall. (U. S.) 384;

Comm. v Callaghan, 2 Va. Cas. 460.

⁵ State v Ellis, 33 N. J. L. 102.

⁶ Walsh v People, 65 Ill. 58.

⁷ Scarlet's Case, 12 Coke 98.

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